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Supreme Court, U.S.
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CLERK

No. 97-164

IN THE SUPREME COURT
OF THE UNITED STATES

LINDA K. HANSEN - PETITIONER,

-vs-

SEA RAY BOATS, INC. RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
IN AND FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. IS A MOVING PARTY'S BURDEN SATISFIED UNDER RULE 56(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHERE COUNSEL SUBMITS ARGUMENT, COMMENTS, AND OPINIONS OF SUGGESTED EVIDENCE?

II. WHAT MEASURE OF EVIDENCE IS REQUIRED OF A MOVING PARTY UNDER RULE 56(C), F.R.C.P. TO ESTABLISH ITS INITIAL BURDEN ON A MOTION FOR SUMMARY JUDGMENT?

III. DID THE TENTH CIRCUIT COURT OF APPEALS SUBSTANTIALLY DEPART FROM THE ACCEPTED AND USUAL COURSE OF SUMMARY JUDGMENT REVIEW, OR HAS IT SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition, but are not parties to the Petition, are as follows:

Additional Plaintiffs [not parties on Petition]:

Monte C. Hansen
Monte T. Hansen
Carol Ravarino
Richard Ravarino
D.J. Humphries.

Additional Defendants [not parties on Petition]:

Southwest Marine, Inc., an Arizona corporation
Professional Mariner, a California corporation
Newmark Products, Inc.,a California corporation

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[X] is unpublished

The opinion of the United States district court appears at Appendix ___ to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 20, 1997.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 23, 1997, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition is based upon the standards governing motions brought under Rule 56 of the Federal Rules of Civil Procedure, and the due process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

This is an action brought under Utah law in the United States District Court for the District of Utah [hereinafter "District Court"] based upon diversity of citizenship under 28 U.S.C. §1332, for personal injuries sustained by more than one person, but including the Petitioner Linda Hansen. These injuries were sustained as a result of an electrical shock caused by defects in a recreational boat manufactured by defendant Sea Ray Boats, Inc.

On the morning of April 1, 1988, the subject Sea Ray boat was docked in a slip at the Wahweap Marina at Lake Powell, Utah. Linda Hansen's son, Monte T. Hansen, dove into the water behind the boat in the early morning to refresh himself. Almost immediately, he experienced difficulties similar to those of a drowning person. He was experiencing an electrical shock from stray AC electrical current in the water secondary to the claimed defects in the boat. Duane J. Humphries, a friend of Monte T. Hansen, entered the water and was also incapacitated by the electrical current in his attempt to rescue Monte T. Hansen. Linda Hansen, Carol Ravarino, and her son, Richard Ravarino, were situated on the stern of the boat during the accident sequence.

Both Linda Hansen and Carol Ravarino reacted to the emergency by moving toward the swim platform to reach the boys in the water to pull them to safety, but when Carol Ravarino made contact, she screamed to Linda Hansen the word "electricity," and was then pulled into the water. Immediately upon learning that an electrical current was causing the incapacitation of those in the water and Mrs. Ravarino's appreciation of a shock while on the stern of the boat, Mrs. Hansen jumped from the swim platform to the safety of the

wooden dock.

Mrs. Hansen claimed damages for negligent infliction of emotional distress resulting from her fear of electricity, and by reason of her being actually threatened by it causing her to retreat from the source of harm.

Respondent moved the United States District Court for summary judgment on Mrs. Hansen's claim for negligent infliction of emotional distress and argued that under the Utah Supreme Court's decision in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).[1] The defendants claimed that Mrs. Hansen was not herself actually threatened with danger of receiving an electrical shock, and did not actually fear for her own safety by reason of electrical shock. Mrs. Hansen maintained that she did in fact fear for her own safety during the incident.

Following a course of lengthy oral arguments on the subject, the District Court elected to seek clarification from the Utah Supreme Court on an Order of Certification. The District Court did, however, grant summary judgment on January 8, 1990. The District Court delayed entry of that order pending the certification process to the Utah Supreme Court.

The parties agreed that the form of the factual statement in the Order of Certification should be such so as to give basic facts to the state court to determine the legal questions. The Utah Supreme Court in Hansen v. Sea Ray Boats, 830 P.2d 236 (Utah 1992), premised its review of the District Court's legal questions based upon the false impression that "[T]he

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[1] In Johnson v. Rogers, 763 P.2d 771 (Utah 1988) Utah adopted the "zone of danger" rule. A party must establish two elements in order to recover under that rule; (1) the plaintiff must show that personal fear resulted from the source of harm, and (2) that the source of harm actually threatened the plaintiff.

order of certification makes it clear that Judge Greene of the United States District Court has already considered whether Mrs. Hansen was in danger and has determined that she was not.[2]" Id. (footnote in the original). The Utah Supreme Court was therefore already in a position favorable to the Respondent, because an apparent, although erroneous, factual determination was entered that Mrs. Hansen was not in the "zone of danger." If the order contained a statement that Mrs. Hansen was in danger, then the matter was clearly one of fact for the jury and would be fruitless to seek clarification from the Utah Supreme Court on that issue. It was recognized by the parties that threat of harm was a necessary element for Mrs. Hansen's claims, but remained a disputed matter as recognized by the Utah Supreme Court. During oral argument on the certified questions, Justice Zimmerman of the Utah Supreme Court commented in response to a hypothetical situation given by counsel for the Respondent Sea Ray, as follows:

> MR. DALTON: Hypothetical, I think, illustrates the point here very well, but the same hypothetical appears in [Restatement 2d Torts § 313]. Let's take the example, the mother is standing on the sidewalk, the child is crossing the street and gets wiped out by a car. Under the 313 example, she's not in any danger herself. She cannot --

---

[2] Question 1 of the order specifies: "Whether a person not actually threatened with bodily harm . . . ." The other questions in the order also rely on the hypothetical proposition that Mrs. Hansen was not in actual danger at the time of the incident. These were not undisputed facts, but were derived from the District Court's concerns on the legal parameters of the zone of danger rule in Utah.

JUSTICE ZIMMERMAN: It's a fact question.

MR. DALTON: Fact Question.

JUSTICE ZIMMERMAN: The car might jump the curb. The jury could find the car jumped the curb.

[Pet.App. at F , pg 35 lines 5-17].

The Utah Supreme Court made its position well known to the parties that it would not pass on what appeared to be a factual issue, and that issues of fact in the case clearly remained. The state court commented:

J. ZIMMERMAN: It seems to me much of what you parties are arguing about is really fact issues. The other side [Sea Ray] wants to tell us that the facts are X and you want to tell us they're Y, but we can't decide any of that because this is certified to us only on the question of what's Utah law on the issue.

MR. THURBER: Well, the defendants in this case are arguing that, based upon the court's -- the U.S. Court certification alone and the statement of facts that appears in them, without regard to other deposition testimony or affidavits or proceedings in the U.S. Court, that based upon those facts alone the conclusion of Section 313 or the Restatement generally, this other part is compelled. And it's our position that there are, in reality, facts that require decision alone.

J. ZIMMERMAN: But our -- we can't -- it seems to me, maybe I misapprehended this, but that all we can legitimately do is tell the trial

court what the law is in Utah regarding zone of danger and whether 436 applies or not. We aren't in a position to say: And therefore, based upon what you say the facts may be, defendants are entitled to summary judgment. That's not for us to call. That's for the trial court to call, and we aren't -- we can't be squeezed into the position of granting a hypothetical summary judgment based on some hypothetical fact. [Emphasis added]
[Pet.App. at F pg. 36 lines 15-25 to pg. 37 lines 1-18]

The Utah Supreme Court was not in a position to determine that factual disputes remained to be resolved, since it had before it certified questions based upon an assumption that Mrs. Hansen was not threatened with actual harm. The answers to the questions were to give guidance to the lower court on application to the facts of the case.

The evidence of record is over-whelming that the true intent of the Order of Certification was to present hypothetical facts in an attempt to legally define the scope of the zone of danger. This is exactly what Judge Greene espoused as his basis for the order of certification. There was not, however, any early indication from the lower court that if the questions came back answered in the negative that an immediate order of dismissal would be entered against Mrs. Hansen's claims. Mrs. Hansen's former attorney, Anthony Thurber, who represented the Petitioner on certification has stated, and is part of this record:

"[T]he purpose of the proposed order [of certification] was to present a hypothetical question to the Utah Supreme Court for resolution under Utah law, and not to settle factual issues for purposes of the underlying

federal litigation."

The Respondent's counsel, Donald Dalton, represented to the state court, however, that the factual issues in the order of certification were matters specifically resolved by Judge Green in the lower court. His various comments to the state court on that subject are unambiguous:

> J. ZIMMERMAN: I mean, if an airplane is coming down aimed at the capitol and it veers off at the last minute, we were threatened, weren't we, even though it didn't land here, it landed over in the avenues?
>
> MR. DALTON: Well, in that event, I think you do have a factual question and that will be resolved by the jury.
>
> What I am telling you, though, is that Judge Green resolved that for you. He said she is not in danger, actually.

[Pet.App. at F, pg. 38 lines 16-25 to pg 39 line 1]

> J. ZIMMERMAN: Why was Mrs. Hansen never in danger if the boat was energized?
>
> MR. DALTON: Well, I don't believe the boat was energized. But the bottom line of that is, if that were something that Judge Green thought we should know, that would have appeared in the order. That never entered into his --
>
> J. ZIMMERMAN: So she wasn't threatened, period?
>
> MR. DALTON: He assumes she was sitting

safely in the boat.
[Pet.App. at F. pg. 40 lines 14-24]

J. STEWART: We can't decide the facts (inaudible) before us.

MR. DALTON: We're not asking you to resolve it.

J. STEWART: I understand that. That's why I say maybe you'll resolve it on summary judgment or something.

MR. DALTON: That's what brought us here. We got down there and decided there's no genuine issue as to the material fact as to whether she was in danger or not. That's been decided. Judge Green says no, she's not. She's not in any danger. That's been decided.
[Pet.App. at F, pg. 41 lines 13-25]

The is absolutely no basis in the record for the statement that the District Court had made a factual determination that Mrs. Hansen was not threatened with harm. If that were the absolute fact, as a matter of undisputed fact, then there would have been no reason whatsoever to certify the questions. The representations of counsel were simply false and misleading.

The argument to the state court is completely opposite to what the Petitioner understood the purpose for which certification was sought; to define the scope of the zone of danger on hypothetical facts. Little did Petitioner know that the hypothetical facts would be argued as being a statement of undisputed facts in the state court or on remand to the lower court.

On appeal to the United States Court of Appeals for the Tenth Circuit [hereinafter "Court of Appeals"], the decision of the District Court granting summary judgment was affirmed. The Court of Appeals, however, ruled that the record was not complete for a de novo review because the entire deposition of Mrs. Hansen was not included in the record on appeal. The deposition of Mrs. Hansen was never a part of the record, even at the summary judgment level. The defendants simply quoted a small passage from it. The record on review was as complete as it was to the District Court. Despite the unavailability of the entire deposition, the Court of Appeals, nevertheless, concluded that the "evidence" available to the District Court was sufficient for the judge to find against Mrs. Hansen.

This entire matter has received less than pure judicial scrutiny, and, in fact, the well established review standards have escaped application. The right to a fair and impartial review has been replaced by arguments of counsel of what they believed the evidence would show. There is no evidence in the record to demonstrate that Mrs. Hansen was not threatened with harm from the electrified field on and around the boat to where she was within inches of direct injury.

REASONS FOR GRANTING THE PETITION

I. IS A MOVING PARTY'S BURDEN SATISIFED UNDER RULE 56(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHERE COUNSEL SUBMITS ARGUMENT, COMMENTS, AND OPINIONS OF SUGGESTED EVIDENCE?

A review on the merits of the record in this matter will demonstrate that the defendant offered no evidence

whatsoever in support of its contention that Mrs. Hansen could not satisfy the second prong of the zone of danger test concerning whether she was threatened with actual harm. The entire transcript from the various summary judgment hearings demonstrates that the defendant relied upon no evidence when making its argument to the District Court. Without the benefit of any evidence, counsel for the Defendant made bald assertions of why Mrs. Hansen could not have been threatened with actual harm.

Initially and in support of the motion for summary judgment, the defendant relied upon a single quotation from the deposition of Mrs. Hansen addressing the fear question, which provided:

> Q. I take it that you were never shocked, is that right?
> A. No. I was not in the water.
> Q. And I take it --
> MR. DUNN: And you were not shocked?
> THE WITNESS: No. I was not shocked.
> Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?
> A. No.

The limited portion of the deposition was submitted to the District Court without the benefit of the entire deposition transcript. The issue presented by the deposition quotation related to the first element of the "zone of danger" rule; fear. The issue of "fear" was met with an affidavit from Mrs. Hansen which stated that she did, in fact, fear for her own safety. During oral argument on that subject, the District Court recognized the factual dispute which existed as to that issue. The District Court's comments on the subject are not subject to differing interpretation:

THE COURT: Doesn't she say in her affidavit she had fear of a general nature?

MR. WINEGAR: Yes, she did. She had fear of a general nature.

THE COURT: Not something that she now says I should have fear, but she said I did have fear of a general nature.

MR. WINEGAR: That's right and we don't dispute that it was a fearful thing, but the law says she has to fear for her own safety reasonably.

THE COURT: Well she says that in her affidavit. It reasonably is a conclusion. [Pet.App. at D pg. 20, lines 7-17].

At that time, the District Court had apparently ruled in Mrs. Hansen's favor concerning the first prong of the "zone of danger" test, and the matter of summary judgment would have been denied on that basis, standing alone. The District Court commented further:

THE COURT: Well you feel you need to establish both of those points. Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. ... [Emphasis added].
[Pet.App. E at pg. 33 lines 14-17].

THE COURT: Well the rule really ought to be and in just about two minutes I think will be that if a person ought to fear that takes care of the fear question.

[Pet.App. D at pg. 21, lines 10-12].

The District Court was obviously inclined to deny the motion for summary judgment on the issue of fear given the evidence that Mrs. Hansen feared electricity after learning of its presence. Even defense counsel acknowledged the fear that arose at the time Mrs. Hansen became aware of electricity:

> MR. WINEGAR: Well I think even under those circumstances what fear Mrs. Hansen had or should of had for her own safety, for her son's safety.
>
> Yes, she should have feared and properly did so, but for her own safety. Not only did she not fear she admitted it but she shouldn't have feared because there was nothing to fear. She testified at first she wasn't even aware of the electricity and I think that's --
>
> THE COURT: Well what was she running around the countryside to get help for if she wasn't aware of any problem?
>
> MR. WINEGAR: She's there to get help for her son.
>
> THE COURT: But she was aware of a problem.
>
> MR. WINEGAR: Yes. ...

[Pet.App. D at pg. 21, line 23 to pg. 22 line 10].

The District Court had clearly resolved the first issue in favor of Mrs. Hansen.

The second issue of whether Mrs. Hansen was

actually threatened with harm is not as clear, and, in fact, was the pivotal issue upon which the District Court passed judgment against Mrs. Hansen. With respect to the element of being actually threatened with physical harm, absolutely no evidence was submitted. The record is devoid of any matter derived from the pleadings, depositions, interrogatories, or affidavits to support the defendant's claim in that regard.

Defendants' suggested that only the water was energized with electricity, and, therefore, Mrs. Hansen was in a safe place being on the boat. According to that suggestion, Defendants argued Mrs. Hansen had no reason to be threatened by electricity. Defendants offered nothing in the form of affidavit or otherwise to support that bare contention, and such was merely the argument of counsel. There was absolutely no support or evidence submitted in that regard. The undisputed evidence at the time the motions were made was that the boat itself was the conduit through which the electricity flowed, including the engine and all components wired to it, directly or indirectly.

Interestingly, on the very day Petitioner responded to Defendants' motions for summary judgment [December 1, 1989], each of the Defendants filed their designation of expert witnesses concerning the liability aspect of the litigation. In other words, all of the Defendants had experts available to testify concerning the claim that the boat was a safe place. Even more compelling is the fact that when Defendants filed reply memoranda, still no affidavits were submitted on that point, yet the Defendants maintained such to be an absolute undisputed fact.

The lower court had no evidence before it or reliable reference to the record, pleading, interrogatory or otherwise to support what defense counsel were representing to be undisputed fact that persons on the

boat were safe from harm. Defendants provided nothing by way of affidavit testimony that the boat was a safe haven, but simply suggested that matter as being undisputed.

In reply to Petitioner's opposing memorandum to summary judgment, Defendant merely reiterated its opening argument on its motion. Defendant again made very general unsupported claims concerning the safety of the boat:

> Plaintiff's argument, however, ignores the obvious fact that despite her proximity to the water, she was protected at all times by the boat. The zone of danger, if any, was the area of water in which electricity was present, and perhaps the water surrounding that area. Ms. Hansen was completely safe in her location in the boat, away from the water. [Emphasis added]

[Pet.App. G, pg. 41].

Arguments of counsel have no place in the courtroom as a basis for determining undisputed facts. The arguments of counsel in this setting have deprived Petitioner of her day in court with the benefit of an impartial jury to determine the facts from evidence, not arguments of counsel.

Petitioner has failed to discover any decision of this Court or any other federal decision which sanctions a view that arguments of counsel may be relied upon as a basis for granting summary judgment. Without guidance from this Court, there is no measure of minimum evidentiary requirements for a moving party.

It is asserted here that the party with the burden of proof [Sea Ray] introduced only a "scintilla" of evidence on an essential element of the case as to the extent of the electrical field created by the boat's

defects. Absolutely no part of the record was relied upon by the defendants to demonstrate that the boat was electrically safe. Only opinions and suggestions were offered by defense counsel at a hearing before the District Court.

II. WHAT MEASURE OF EVIDENCE IS REQUIRED OF A MOVING PARTY UNDER RULE 56(C), F.R.C.P. TO ESTABLISH ITS INITIAL BURDEN ON A MOTION FOR SUMMARY JUDGMENT?

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), this Court opined that "...regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 2553. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. at 2552.

The Celotex Court does not, however, indicate any minimum evidentiary basis upon which that initial burden is measured. The plain language of the Rule implies that something more than merely suggesting that the evidence in the case could be viewed in a particular manner. Anything less, as here, forces the burden upon the non-moving party to establish otherwise. In other words, the non-moving party really bears the burden of proving his or her case at the

summary judgment level, or at least to the extent of raising an issue of fact to oppose the suggestions of the moving party.

Historically, the movant's burden under Rule 56 of the Federal Rules of Civil Procedure is to lay out the basis of its motion by "pointing out to the district court-- that there is an absence of evidence to support the non-moving party's case." Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). It is untenable for a party to suggest an interpretation of the evidence to meet the burden imposed under Rule 56, and as adopted many times over by this Court.

This Court should grant this petition for certiorari because the method used by the district court in granting summary judgment, and the method used by the 10th Circuit Court of Appeals in reviewing that judgment constitutes a major deviation from the accepted standards, which are directly contrary to the mandates established by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and Celotex, supra. There are not, however, any clear guidelines which address the minimum standards required of a moving party to make a sufficient showing under Rule 56(c), F.R.C.P.

In this case, suggestions of evidence by counsel at oral argument were weighed by the District Court and found against Mrs. Hansen. The moving parties' burden here was satisfied by suggestive argument and a small quotation from a deposition. Suggestions of evidence should have no place under Rule 56(c) standards, and the minimum requirements should be addressed by this Court.

Under the standards governing Rule 56, there are no minimum evidentiary standards which are required of moving parties. Having no minimum requirements,

the moving party is free to draw inferences from the evidence, make suggestions to the District Court, and cast the burden upon the non-moving party to overcome suggested evidence.

This Court should grant Petitioner's request for a writ of certiorari in order for this Court to consider and render its opinion concerning the minimum and necessary requirements for a moving party under Rule 56(c) of the Federal Rules of Civil Procedure. Absent this Court's review, the historical standards imposed upon moving parties will run to obscurity, and impose a greater burden upon the non-moving class of litigants to prove the elements of the case prior to the time of a trial on the merits.

III. THE TENTH CIRCUIT COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF SUMMARY JUDGMENT REVIEW, AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT

The Court of Appeals failed to apply any of the standards when reviewing the District Court's grant of summary judgment. Furthermore, the Court of Appeals viewed all evidence, inferences, and District Court comments against the non-movant, Mrs. Hansen. This departure from the accepted and pronounced standards for a reviewing court has produced an unconscionable result and injustice. Inspection of the opinion rendered by the Court of Appeals demonstrates the departure:

> "Our review of the record, particularly the transcripts of the summary judgment hearing .... convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not

in the zone of danger."
[Pet.App. A , at pg. 7].

The above statement from the Court of Appeal's decision indicates that the Court of Appeals weighed heavily the comments of the District Court. There is no indication that the Court of Appeals independently considered the evidence without deference to the District Court's comments and opinions. An impartial review of the record was not accomplished and is contrary to the uniform review standards. The Court of Appeals further opined:

> "While it would have been preferable for the district court to make an explicit finding that Mrs. Hansen was not in the zone of danger as a matter of law before the certification, we conclude it is clear from the district court's remarks that the court was of that opinion."

[Pet.App. A , at pg. 10].

The Court of Appeal's review addressing the District Court's opinions is contrary to the established standard of review for summary judgment. The reviewing court should accord no deference to the District Court's determinations, but make an independent inquiry into the facts available to the District Court and determine whether a genuine issue of material fact exists. In reviewing a District Court's ruling on summary judgment, the reviewing court accepts as true the evidence presented by the non_movant and draws all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513_14, 91 L.Ed.2d 202 (1986).

The Court of Appeals was looking for guidance

from the District Court as opposed to reviewing the District Court record, and ultimately decided the issue based upon the District Court's comments made during oral argument on the summary judgment motion. The record demonstrates that the District Court itself was waxing and waning on the issue. The proper review should have concerned the evidence available to the District Court in a de novo review, not what the District Court concluded from arguments of counsel, or based upon a lack of the District Court's factual findings.

The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

This petition concerns the effect of the Tenth Circuit Court of Appeal's affirmation of the grant of summary judgment by the District Court. The standards governing motions for summary judgment in general have been cast aside, or at least distilled beyond that imposed by this Court in the leading cases of Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986).

Petitioner submits that the Court of Appeals overlooked or misconstrued the fundamental and critical issue presented in Linda K. Hansen's brief on her appeal concerning the District Court's initial consideration and eventual grant of summary judgment in favor of the Defendants.

Mrs. Hansen's opening argument in her brief on appeal concerned whether the Defendants had satisfied

the bare requirements of Rule 56 of the Federal Rules of Civil Procedure by setting forth each fact to which it contended no genuine dispute existed and as properly supported by references to the record. No facts were submitted, only opinions of counsel.

Mrs. Hansen further asserted that, assuming Defendants' burden was established, there remained genuine issues established by her affidavit that were unrefuted by the Defendants. There was a sufficient record created in the District Court for a proper de novo review of that issue in order to demonstrate that the District Court committed reversible error by granting summary judgment.

The Defendants had the initial burden of showing the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). Affidavits are not required, however. Id. at 2553.

The above standard imposed upon the District Court a duty to first assure that the Defendants met their burden by demonstrating the absence of a genuine issue of any material fact concerning Mrs. Hansen's fear and whether she was safe on the boat. The moving party must, at least, identify those portions of the record demonstrating no fact remains in dispute as to that issue. Id.

Furthermore, when determining whether the Defendants met their initial burden, the District Court had a duty to examine any such evidence in a light most favorable to the non_moving party, Mrs. Hansen. Anderson v. Liberty Lobby, supra. [Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are jury functions,

not those of a judge, whether his ruling is on motion for summary judgment or for directed verdict; evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor][trial court should not act other than with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial].

The District Court's comments, and those of defense counsel demonstrate that the affidavit sufficiently addressed the question of Mrs. Hansen's fear, and moreover, that it "reasonably is a conclusion" that she had fear for her own safety. Based upon the record before the District Court as of April 5, 1990, genuine issues of material fact remained concerning whether (1) Mrs. Hansen feared for her own safety.

The inferences raised by the Defendants to the District Court were three-fold:

(1) the deposition statement meant that Mrs. Hansen was never in fear for her own safety from an electrical shock [Pet.App. D at pg.24, line 22 to pg. 25 line 5];

(2) that Mrs. Hansen never feared for her own safety since she was safely on the fiberglass boat [Pet.App. D at 26, lines 4-9]; and

(3) when Mrs. Hansen learned of the danger confronting the others, her fear was based upon the threat to the other individuals and not to herself [Pet.App. D at pg. 23, line 20 to pg. 24, line 21].

On the other hand, Mrs. Hansen's assertions to the District Court were directly contrary to those inferred by the Defendants:

(1) that Mrs. Hansen was not in fear of being shocked only until she learned that electricity was present on the boat [Pet.App. D at pg. 31, lines 4-22]
(2) the area of the boat where Mrs. Hansen was located produced an electrical shock to one of the other individuals [Pet.App. D at pg. 28, lines 6-22]; and
(3) after learning that electricity was present, she jumped from the boat out of fear for her own safety, and being threatened with harm. [Pet.App. D at pg. 27, lines 11-13; pg 24, lines 3-11; pg. 29 line 22 to pg 30, line 12].

Despite the divergence of opinion and interpretation by the parties concerning whether Mrs. Hansen was in fear for her own safety and whether she was threatened from the stray electricity, those inferences were ultimately construed against Mrs. Hansen. The District Court thereafter entered its conditional order granting summary judgment, unless Mrs. Hansen sought certification on the issue of fear and the zone of danger. [Pet.App. C at 17-18, ¶ 1]. That "Order" [dated January 4, 1990] unequivocally stated the District Court's opinion and ruling that the Defendants had prevailed on the matter of summary judgment. Despite the available admissible evidence, summary judgment was eminent, and Mrs. Hansen was railroaded into an adverse judgment.

Even with the clarifications by the District Court and challenges to defense counsel's representations, the District Court disregarded its own concerns and drew all inferences in favor of the defendants. The District Court was at that time weighing the available evidence and determining the facts, and therefore erred. Anderson, supra, [court cannot act as the jury and

determine credibility, weigh the evidence, or decide upon competing inferences].

Further error is predicated upon the Court of Appeals' refusal to consider the evidence and inferences in a light most favorable to Mrs. Hansen. The Court of Appeals did just the opposite by construing all inferences and court comments against Mrs. Hansen. The fundamental right of due process in applying Rule 56 standards in this case has been abused and overlooked. The focus should have been placed upon the evidence, or lack thereof, as presented in support of the motion for summary judgment. Of interest is the Court of Appeals' opinion comment that

> "[O]ur review of the record, particularly the transcripts of the summary judgment hearing....convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger." [Pet.App. A at pg. 7].

There was absolutely no evidence of any sort concerning whether the boat was electrically safe or whether anyone else on board was safe. As is recognized by the Court of Appeals, only the transcripts were available on that issue, and there is noting in the transcripts but arguments of counsel and not one reference to credible evidence.

The District Court committed error by failing to apply the well-established standards governing motions for summary judgment. First, summary judgment is appropriate only where the record, taken as a whole, could lead no rational trier of fact to find in non-movant's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356,

89 L.Ed.2d 538 (1986).

With respect to the established standard, "[w]here different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted." United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

The trial judge "must construe all pleadings, affidavits, and depositions liberally in favor of the party against whom the motion is made." Adickes v. S.H. Kress Co., 398 U.S. 144, 157_59, 90 S.Ct. 1598, 1608_09, 26 L.Ed.2d 142 (1970)). A genuine issue for trial remains if there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party, or lack of evidence presented by the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Accordingly, if doubt arises regarding any issue, the court must resolve the doubt in favor of the non-movant and deny the motion. Id.

The well established [uniform] standard required the District Court to evaluate all inferences in a light most favorable to Mrs. Hansen. This means that the court was obligated, absent evidence to the contrary, to consider the boat was not a safe place to be, and based upon Mrs. Hansen's affidavit that she feared for her own safety. The District Court was required to consider the inference that Mrs. Hansen feared for her own safety and was threatened by actual harm from the electricity. The fact that she did not receive an electrical shock is not an element required under the zone of danger rule in Utah. See Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Simply stated, the burden imposed upon the Defendants was not met, and summary judgment, from its inception in this case, should not have been entered

by the District Court, conditionally or otherwise. There were clearly issues of fact which remained for the fact-finder. There was no basis in law or fact from which the District Court could grant summary judgment, and certainly nothing before the Court of Appeals since it merely reviewed what the District Court stated as its opinions in the various hearings. The Court of Appeals made no independent review of the available evidence; to wit; the affidavit of Mrs. Hansen, and a few sentences from her deposition. That is all there was, except for the many, many suggestions offered by the defendants. Such comments and arguments surely cannot surmount even the minimum elements for a moving party.

CONCLUSION

The usual and accepted course of judicial proceedings governing motions for summary judgment has been grossly abused in this case. The effect of the Tenth Circuit Court of Appeals' decision has a far reaching effect as creating a standard which allows a movant to offer suggestions of what the evidence might reveal. The new standard permits counsel to offer inferences and opinions to support otherwise impotent motions.

The underlying effect of the result reached in this matter sets a new lesser standard for the moving party on a motion for summary judgment. The suggestion of evidence through argument as satisfying the burden denies the non-moving party of the opportunity to a due process consideration of the merits of the cause of action. Application of the standard established by this case will reach forward through citation of unpublished decisions. The usual and accepted standards have been distilled by an improper application of the long-settled

rule, and the District Court's judgment must be reversed to maintain judicial harmony.

This Court has remained steadfast with respect to its prior rulings concerning procedural inequalities and reversed without a second thought. This case merits some consideration to buttress and protect non-movants from abuses of remarks made by counsel of their interpretations of the evidence. Factual matters must remain within the province of the jury and await the proper time for presentment. Premature disposal of claims based upon suggested matters denies the litigant of a fair trial and due process of law if there is not some constraining basis for the initial burden on summary judgment motions.

The petition for a writ of certiorari should, accordingly, be granted.

DATED this 22nd day of July, 1997.

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
FEB 20 1997
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LINDA HANSEN, MONTE T. HANSEN,

Plaintiffs-Appellants,

V.

SEA RAY BOATS, INC.,

Defendant-Appellee

No. 94-4252
(D.C. No. 88-CV-708-G
(D. Utah)

MONTE C. HANSEN, LINDA K. HANSEN.

Plaintiff-Appellee.

MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO,

Plaintiffs,

SEA RAY BOATS, INC.

Defendant-Appellant.

No. 95-4190
(D.C. No. 88-CV-708G)
(D. Utah)

BRUNSWICK CORP., a Delaware

corporation; SOUTHWEST MARINE,
an Arizona corporation;
PROFESSIONAL MARINER, a
California corporation: NEW
PRODUCTS,

Defendants.

ORDER AND JUDGMENT*

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. Se-e Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered * submitted without oral argument

In 1987, plaintiffs Monte C. and Linda K. Hansen purchased a twenty-five foot cruiser manufactured by defendant Sea Ray Boats, Inc. On April 1, 1988, the Hansens' son, Monte T. Hansen, and others sustained injuries from in-water electrical shock,, caused by a faulty grounding system in the boat. All three Hansens, and other plaintiffs who are not parties to this appeal, brought suit in the United States District Court for the District of Utah. Mrs. Hansen, who was on the boat and witnessed her son begin to drown because of the electrical current, brought a claim for negligent infliction of emotional distress.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case. res judicial and collateral estoppel. The court generally disfavors the citation of order and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Her son brought a claim for negligence, and the Hansens jointly brought claims for breach of warranty.

The district court granted Sea Ray's motion for summary judgment on Mrs. Hansen's claim after the Utah Supreme Court answered questions certified to it regarding the scope of a negligent infliction of emotional distress cause of action under Utah law. Mrs. Hansen appeals this judgment. Monte Hansen's claim was tried to a jury and a verdict was returned in favor of Sea Ray. The district court denied Monte Hansen's motion for new trial and he appeals. The claims of Mrs. Hansen and Monte Hansen are the subject of case No. 94-4252. Finally, the parties agreed to bifurcate the warranty portion of this action from the negligence portion. In the warranty action, the Hansens prevailed on the merits and were eventually awarded attorney fees under the Magnusson Moss Warranty Act(15U.S.C. 2310). Sea Ray does not appeal the merits of the warranty judgment, arguing, in case No. 95-4190, only the propriety of the attorney fee award. Before addressing the questions presented in these appeals, we first address the Hansens' pending motion to dismiss the appeal in case No. 95-4190.

Motion to Dismiss Appeal in Case No. 95-4190

The Hansens filed a motion to dismiss the appeal in case No. 95-4190, arguing that Sea Ray's notice of appeal from the warranty judgment was untimely. The verdict in favor of the Hansens on the warranty claims was returned on June 5, 1995, and judgment was entered on June 19. On June 29, Sea Ray served and filed a motion for new trial. A hearing was held on September 8, and the district court denied the motion from the bench, with a written order filed on September 28. On September 28, the district court also awarded attorney fees to the Hansens on the warranty claims. On October 4, Sea Ray served a timely motion to amend the attorney fees judgment. On November 13, Sea Ray filed a motion for extension of time to file a notice of appeal from the merits judgment. On November 21,Sea Ray filed a notice of appeal indicating that it was appealing from the judgment on the merits of the warranty claim as well as the award of attorney fees. On January 4, the district court denied both the motion to amend the attorney fees judgment and the motion for extension of time.

Probably realizing that the notice of appeal as to the merits of the warranty judgment was untimely, See Budinich V. Becton Dickinson & Co., 486 U.S. 196, 202 (I 988) (holding unresolved issue of attorney fees did not prevent judgment on the merits from being final). Sea Ray has not pursued the merits of the warranty judgment on appeal. See Brief of Sea Ray at 6.

Sea Ray's notice of appeal with regard to the attorney fees, however, is timely. The fact that the notice of appeal was filed before the district court ruled on the timely motion to amend is of no moment. Under Fed. R. App. P. 4(a)(4), a notice of appeal filed before the disposition of a timely motion to amend becomes effective upon the entry of the judgment on the motion. Because Sea Ray has limited its appeal to the attorney fees judgment, a judgment over which this court has jurisdiction, the motion for damages for filing a frivolous appeal is not well taken. The Hansens' motion to dismiss the appeal in case No. 95-4190 and their motion for damages for delay and costs are both denied.

Linda Hansen's Claim of Negligent Infliction of Emotional Distress

In 1988. The Supreme Court of Utah held that a cause of action could be maintained in Utah for negligent infliction of emotional distress. See Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988). A majority of the court agreed that the test for determining liability for the tort would be the standards as set forth in section 313 of the Restatement (Second) of Torts and as explained in the accompanying comments. See id, at 785 (Zimmerman, J., joined by three other justices, concurring in part).

The Restatement provides:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts 313 (1965) emphasis added). This standard is commonly referred to as the "zone of danger" test. See Johnson, 763 P. 2d at 779. The issue on appeal is whether, at the time the order was certified to the Utah Supreme Court, there existed a disputed issue of material fact regarding Mrs. Hansen's exposure to "an unreasonable risk of bodily harm," see Restatement (Second) of torts 313 (1965), or, put another way, whether she was in the zone of danger. The parties agreed in the district court that the test was a dual one: a putative plaintiff must have feared for his or her own safety, and that fear must have been based o actual danger. See Supp. App. At 97-98; see generally Restatement (Second) of Torts 313 & cmt. D (1965).

During the hearing on Sea Rays' motion for summary judgment on Mrs. Hansen's claim, the court focused on two questions: (1) would the fact that Mrs. Hansen was watching her son in a hazardous situation, as opposed to observing a stranger in similar peril, alter the determination of whether she was in the zone of danger because of her possible impulse to rescue her son? See Supp. App. At 105, 109-10, 113; and (2) while Mrs. Hansen may not have been in actual danger what effect would there be from her genuine, albeit incorrect, fear that she was? See id. At 103; see also App. at 159 (transcript of certification order hearing).

After listening to the arguments about whether the facts established Mrs. Hansen's presence in the zone of danger, the court informed the parties that it would grant Sea Ray's motion for summary judgment unless Mrs. Hansen wished to file a motion for certification

to the Utah Supreme Court focusing on the concerns developed at the hearing and mentioned above. The parties jointly requested certification. With the approval of both counsel for the Hansens and counsel for defendants as to form, the district court certified the following questions to the Utah Supreme Court:

1. Whether a person not actually threatened with bodily harm, who incorrectly but reasonable believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress that satisfies the "threat of harm" requirement of Section 3 13 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

2. Whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the "fear for one's own safety" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

3. If the answer to question 1 is no, would the answer be yes if the person described therein witnesses an immediate family member threatened with actual bodily harm.

App. at 186-87. When the Utah Supreme Court answered all three questions in the negative, the district court entered summary judgment for Sea Ray.

On appeal Mrs. Hansen contends the questions of law certified to the Utah Supreme Court were based on a hypothetical set of facts and the "[t]here has never been a bona fide finding by the lower court that Mrs. Hansen never feared or was threatened by the electrical current once it was determined to have been the source of harm to those who received electrical shocks." Opening Brief of Plaintiffs at 6. Mrs. Hansen argues that issues remain regarding her fear for her own safety, and that the issue of whether she was threatened with harm "fell into a procedural void." Id at 6-7. The upshot of the certification proceeding, according to Mrs. Hansen was to transform hypothetical facts used for the purpose of eliciting a legal opinion from the Utah Supreme Court into actual undisputed facts supporting the districts

court's legal conclusion that Mrs. Hansen was not in the zone of danger.

We view this appeal as asking us to decide whether the facts, as framed in the certification order, were hypothetical only, or whether they had already been decided by the district court prior to the certification. On review of the certification order, we conclude that the only statement Mrs. Hansen could logically take exception to is the first phrase of the first question: "[w]hether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim. . . ." App. at 186. This wording established for the Utah Supreme Court that Mrs. Hansen, herself, was not in the zone of danger. The wording of the second question takes into account the fact that Mrs. Hansen feared for her own safety, a finding necessary to her recovery, but did not comprehend the source of the danger, (because the agent of the danger was not identified to be electricity until later). This question has no negative connotations for Mrs. Hansen. It simply reflects the apparent state of the record,[1] The third question asks whether a relationship with the actual victim is important in determining the zone of danger, thus giving the Utah court the opportunity to broaden its law beyond that established in Johnson and, arguably, giving Mrs. Hansen an additional basis for her claim. So, we focus on whether there was a genuine dispute as to Mrs. Hansen's actual exposure to bodily harm at the time the certification order was prepared or whether the district court had resolved that issue as a matter of law prior to certification.

Our review of the record, particularly the transcripts of the summary judgment hearing and the certification order hearing, convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger. Mrs. Hansen's argument that the districts court's summary judgment order was based only on hypothetical facts is therefore, without merit.

At the outset, the parties agreed that the court would have to decide the meaning of the zone of danger under the circumstances presented. See Supp. App. at 97. During the course of the summary judgment hearing the court made the following observations.

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[1] We note that the record on appeal does not contain all of the materials that were before the district court when it ruled on the summary judgment motion.

"Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. Is it fatal that in fact there was no danger?" Id.at 103;

"And here it is not alleged or even claimed that there was physical danger by simply being on the boat.... I'm not sure that that's what [plaintiff' s counsel] agrees to but I suppose that's the case." Id at 104.

Turning to the fact that Mrs. Hansen's son was a direct victim, the court stated:

"Well the only real question that is, the court is in doubt on is whether the relationship has any bearing upon actual danger" Id at 113.

The court also observed:

> The thing that's just giving to me a little bit of interest, in the circumstances of an accident that's really traumatic, a person who is intimately connected with the person in the danger might very well do an irrational thing as jumping out of a window in an earthquake and you would be saying, everything would be just perfectly fine if you just stay right there under the table.
>
> You're not in any danger if you stay there so you're not in the zone of danger but when that happens a person objectively might do some irrational thing if they were related to the person and I don't know whether that has a bearing on determining whether a person, though otherwise out of danger is in danger because of her relationship.

Id_ at 109- 1 0. In the certification order hearing, the court made the following observations:

"Well, I think you both agree don't you that she was, in fact, was not in the zone of danger?" App. at 158.

In trying to concisely frame the question to be certified, it is clear that the court was no longer concerned about actual threat of bodily harm. The court stated:

> "Well the whole thing we're trying to do here as I have conceived it is to test whether a person's reasonable belief and fear based upon that reasonable belief coupled with witnessing a family member, a close family member who clearly is in danger, whether that is enough, that's it. Isn't is?" Id. At 159.

And again, the court's thinking was clearly indicated:

> That's the only thing we're trying to do. We're not trying to determine what is the zone of danger or whether her fear was reasonable, those are – if the Supreme Court of Utah should say, a person who is not in the zone of danger, whatever that is, has reasonable fear and it involves a family member, a close family member and if the Supreme Court of Utah should say, that isn't enough, that's that.
>
> If they should say that is enough then we have some question of fact to try, was it reasonable for her to be in fear, was she really in fear, was - and the reasonableness of the whole thing, I thin there would be questions of fact but I don't think we need to implicate the Supreme Court of Utah in any of that.

Id. At 161. The district court clearly had decided that Mrs. Hansen was not in the zone of danger:

> "I think that's what has to be stated to the Supreme Court. She is wrong, she was not in the zone of danger." Id. At 162
>
> "Well I think the questions as have been suggested by [defense counsel] ought to be combines into just on question. For instance the first question doesn't have the element that I think it has to have. . . . [w]hether a person who is not in the zone of danger –"

> "[H]as there ever been a case that addressed the question of whether a person believes subjectively believes they're in the zone of danger but wrongly so?" Id. At 165.

Finally, the court summarized the issue:

> "Well I'm interested in the fundamental question whether a person who isn't in the zone of danger who believes that they are and has a reasonable fear and there is a family member involved has a cause of action..... If you want to certify something like that and can frame it together fine, if you don't, let get on with it, I'll rule on the thing." Id. At 174-75.

While it would have been preferable for the district court to make an explicit finding that Mrs. Hansen was not in the zone of danger as a matter of law before the certification, we conclude it is clear from the district court's remarks that the court was of that opinion. The questions were certified for guidance in situations where someone might mistakenly believe he was in danger but was actually safe, and in situations where the actual victim was closely related to the claimant. Given the observations of the court in the record, we conclude there was no dispute of material fact regarding Mr. Hansen's presence in the zone of danger given the state of the law in Utah at the time and absent any expansion of that law by the Utah Supreme Court. Thus, the wording of the certification order with regard to the first question was not merely hypothetical, but was based on the decision of the district court that Mrs. Hansen was not actually threatened with physical harm. Once the Utah Supreme Court answered the questions in the certification order in the negative, Mrs. Hansen had no claim remaining, and the entry of summary judgment by the district court was proper.[2]

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[2] Our conclusion that the district court had made a factual determination regarding the question of Mrs. Hansen's presence in the zone of danger is reinforced by the court's later order denying the Hansens' motion to reconsider the summary judgment. There the court stated:

(continued)

As we have noted, we do not have the complete summary judgment record. The parties in the district court refer to Mrs. Hansen's deposition but it is not in our record, and the only evidence we have going to Mrs. Hansen's claim is her affidavit. To the extent that Mrs. Hansen is asking us to review the propriety of the districts court's determination regarding her presence in the zone of danger, we are unable to do so without a complete record. See Ewers v. Board of County Comm'rs, 802 F.2d 1242, 1250 (10th Cir. 1986) (unable to review claim because evidentiary matters considered and relied on by district court are not included in record on appeal). When reviewing the entry of summary judgment, we perform the same analysis as the district court, determining whether "the pleadings, depositions,

[2] (... continued)

> Plaintiff Linda Hansen urges this court to reinstate her claim for negligent infliction of emotional distress. In support of her motion, plaintiff argues that this court has never made a determination that she was not in the "zone of danger."
>
> Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification, by Order dated December 22, 1989, and again after the opinion of the Utah court was rendered, by Order dated June 1, 1992, this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Supp. App. at 8-9

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answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56 (c). In the absence of a complete record, we are unable to conduct a de novo review and must, therefore, affirm the conclusion of the district court that Mrs. Hansen was not actually threatened with bodily harm, and that summary judgment for Sea Ray was proper. See Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979-80 (10th Cir. 1992);

The Negligence Claim of Monte Hansen

Monte Hansen contends the jury's verdict finding no negligence on the part of Sea Ray is not supported by the law and is contrary to the weight of the evidence. Monte Hansen failed to move for a directed verdict at the end of all the evidence. By virtue of this failure, he has forfeited his opportunity to secure appellate review of the sufficiency of the evidence. See Green Constr. Co. v. Kansas Power & Light Co., 1F.3d 1005, 1012 (10th Cir. 1993). We therefore decline to disturb the verdict of the jury.

Monte Hansen next contends the district court erred in refusing to grant a new trial. We review a new trial ruling base on the weight of the evidence, which "normally presents a question of fact and not of law," for "a manifest abuse of discretion," "focus[ing] on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence. " Getter v. Wal-Mart Stores Inc., 66 F .3 d I 1 19, 1125 (10th Cir. 1995) (quotations omitted), cert. denied, 116 S. Ct. 1017 (1996). "So long as a reasonable basis exists for the jury's verdict, we will not disturb the district judge's ruling." Sil-Flo. Inc. v. SFHC Inc., 917 F.2d 1507, 1519 (10th Cir. 1990) (quotation omitted). We have reviewed the cited portions of the record and conclude that the evidence does not so clearly mandate that Sea Ray should be held liable "that reasonable minds could not differ on this result." Id.

Monte Hansen finally contends the special verdict form prepared and submitted by the court was ambiguous, overly suggestive of a verdict in favor of Sea Ray, inconsistent with the evidence, and otherwise deficient. The first question on the special verdict form was:

> Was Sea Ray negligent in the manner it manufactured, repaired or tested the boat and/or was the boat, at the time it was manufactured and sold, unreasonable dangerous due to a defect or defective condition?

App. at 1. "Ambiguous" is defined as "[I]iable to more than one interpretation; [ ]uncertain or indefinite." Webster's II New Riverside University Dictionary 99 (1988). Had the jury answered "yes" to this question, there may have been need for some clarification. However, its "no" answer is clear. It is not subject to two different meanings and thus is not ambiguous. This was the only question the jury answered. There are thus no inconsistent answers in the special verdict that needed to be reconciled either by the district court or on appeal.[3]

Finally, to the extent Monte Hansen is asking this court to reconcile the answer to the special verdict question with the evidence presented, that is another effort to secure review of the weight of the evidence and is precluded by his failure to move for a directed verdict.[4]

Sea Ray's Challenge to the Award of Attorney Fees

Sea Ray contends the district court erred in its award of attorney fees under the Magnuson-Moss Warranty Act.

> We review the district court's attorney fee award for abuse of discretion and will hold the underlying findings of fact reversible only if they are clearly erroneous. A court has abused its discretion when it "based its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.

---

[3] We note additionally that to the extent Monte Hansen is challenging the special verdict form itself, as opposed to the answer(s) given by the jury in response to the form, he has waived his opportunity to challenge the form because he failed to object to the special verdict form at trial. See Kloepfer v. Honda Motor Co., 898 F.2d 1452, 1456 (10th Cir. 1990).

[4] Fugitt V. Jones, 549 F.2d 1001 (5th Cir. 1977), is not to the contrary. That case involved inconsistent answers to more that one special verdict question. The court in Fugitt held that ▪[a] motion for directed verdict was not required to preserve this form of the issue.▪ Id. at 1004.

Mann v. Reynolds, 46 F.3d 1055. 1062 (10th Cir. 1995)(citation omitted).

The record on appeal relative to the attorney fees issue contains only the pleadings filed in conjunction with the Hansens' motion for fees, a summary order from the district court granting that award, and another summary order denying Sea Ray's motion to alter or amend the judgment (attorney fees). The docket sheet reflects that the district court held a hearing on the fees issue, but a transcript of that hearing is not in the record.

As mentioned above, "[a] district court that does not exercise its discretion, or makes a decision without providing reasons, abuses that discretion." ARW Exploration Coip. v. Aguirre, 45 F.3d 1455, 1459 (10th Cir. 1995). We have examined the briefs of the parties contained in the record relative to the fees issue and note that the issue urged by Sea Ray on appeal was argued in its brief to the district court. See Supp. App. 55-63. As noted, the district court held a hearing on this matter, but the transcript is not in the record. A trial judge is obligated to give reasons for a decision, but those reasons can be provided by statements on the record or by written opinion, as long as there is some record of the court's reasoning to facilitate appellate review.

Because the issue Sea Ray urges here were before the district court, we presume that the court addressed those issues at the hearing. However, since we do not have a transcript of the hearing, we have nothing in the record to indicate how the district court exercised it discretion in arriving at its decision to grant the Hansens attorney fees. As we have nothing to review on appeal, the judgment of the district court to grant the Hansens' motion for attorney fees must stand. See Deines, 969 F2d at 979-80.

The Hansens' motions to dismiss the appeal in case No. 95-4190 and for damages for delay and costs are both DENIEED. The judgments of the district court in cases No. 94-4252 and No. 95-4190 are AFFIRMED.

Entered for the Court

Mary Beck Brisco
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LINDA HANSEN and MONTE T. HANSEN,

Plaintiffs - Appellants,

V. No. 94-4252

SEA RAY BOATS, INC.,

Defendant - Appellee.

ORDER

Filed April 23, 1997

Before **TACRA, EBEL** and **BRISCOE,** Circuit Judges.

Appellant Linda Hansen's petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: "s/ L. Bahzano".
Deputy Clerk

Mr. David A. McPhie
McPhie & Nelson
2105 E. Murray-Holladay Road
Salt Lake City, Ut. 84117

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jan. 8 8:02 AM '90
Markus D. Zimmer Clerk

By _____
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO RICHARD RAVARINO,

Plaintiffs,

vs.

SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California

ORDER

Civil No. 88-C-708G

corporation; and NEWMARK PRODUCTS, INC., a California corporation,

Defendants.

On December 6, 1989, the Court heard arguments on the defendants' motions for summary judgment on the claims of Linda Hansen and also on defendant Southwest Marine's motion to compel. Plaintiff was represented by Anthony M. Thurber, defendant Sea Ray was represented by Donald L. Dalton, defendant Southwest Marine was represented by Todd S. Winegar, defendant Professional Mariner was represented by Glen T. Hale, and defendant Newmark did not appear.

The Court, after hearing argument and being advised in the merits, hereby rules as follows:

1. The Court hereby grants the defendants' motion for summary judgment on the claims of Linda Hansen unless Linda Hansen files on or before December 29, a request for certification of the question to the Utah Supreme Court. If the plaintiff Linda Hansen makes such a filing including appropriate documents to make the certification to the Utah Supreme Court, this Court will schedule a hearing on whether to request such certification

2. Plaintiff shall fully respond to all interrogatories and request for production of documents as requested in Southwest's motion to compel on or before December 29, 1989.

DATED this 4" day of January, 1990.

BY THE COURT:

"s/ J.Thomas Greene".
Honorable J. Thomas Greene
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

-000-

MONTE C. HANSEN, et al.,	)	Case No. C88-708
Plaintiffs,	)	Salt Lake City, Utah Date: April 5, 1990
vs.	)	Time: 9:30 a.m.
SEA RAY BOATS, et al.,	)	
	)	
Defendants.		

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiff: TONY THURBER, ESQ.

For the Defendants: TODD WINEGAR, ESQ.,
GLEN T. HALE, ESQ., and
DONALD L. DALTON, ESQ.

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stricken.
She talks about things as, I now realized I have since the accident learned, had I known that the victims, their problems were caused by electricity.
So she goes back and reconstructed it at the time she had no fear of being shocked but --

THE COURT: Doesn't she say in her affidavit she had fear of a general nature?

MR. WINEGAR: Yes she did. She had fear of a general nature - -

THE COURT: Not something that she now says I should have fear but she said I did have a fear of a general nature.

MR. WINEGAR: That's right and we don't dispute that it was a fearful thing, but the law says she has to fear for her own safety reasonably.

THE COURT: Well she says that in her affidavit. It reasonably is a conclusion.

MR. WINEGAR: I think the reading of her affidavit is helpful because she tries to tie it into shock after she says, well I was afraid and she said: Well, I've learned since the incident that there was electricity.

THE COURT: Well was that just a gratuitous statement, I was scared at the time for my own safety. I don't know why, but I was. If I had known there was electricity, I would have been scared to death. That's just something she

point up again.
Second of all there is a case from Wisconsin which we cited where there was a gas explosion in the house and the parents said they feared for the child's safety but not their own and based on that, the ruling was that they did not have a cause of action and that's what we have here.
It may be an unkind rule. It may be an arbitrary rule but it is the rule that you have to fear for your own safety - -
THE COURT: Well the rule really ought to be and in just about two minutes I think it will be that if a person ought to fear that takes care of the fear question.
MR. WINEGAR: And Your Honor, with all due respect, I think that that's what the courts have tried to get away from because it gets into a very dark nebulous area -
THE COURT: That would be an objective standard that would be a help to all courts to say: Instead of this cowering person who had an imaginary fear and said for the record just to bring a lawsuit, we're going to take the reasonable man approach and determine whether a person ought to have been in fear in spite of that courageous act and her own protestations that she was not in fear
MR. WINEGAR: Well I think even under those circumstances what fear Mrs. Hansen had or should have had for her own safety, got her son's safety.

Yes, she should have feared and properly did so but for her own safety. Not only did she not fear she admitted it but she shouldn't have feared because there was nothing to fear. She testified at first she wasn't even aware of the electricity and I think that's -

THE COURT: Well what was she running around the countryside to get help for if she wasn't aware of any problem?

MR. WINEGAR: She's there to get help for her son.

THE COURT: But she was aware of a problem.

MR. WINEGAR: Yes, in the water and I don't think Mr. Thurber would even say that up in the back entrance, you know, off of the swim platform that there is any place that anyone can get shocked.

I don't think that anyone would say you can get shocked if you're standing inside the boat. There is just no evidence that indicates that there was any electricity inside the boat back on the swim platform.

In the water, yes, but there is none that I'm aware of that indicates inside the boat.

THE COURT: Is she the only plaintiff inside the boat?

MR. WINEGAR: She's the only one. The others, there is one plaintiff on the swim platform and 3 in the water. She's the only one that was inside the boat.

THE COURT: Okay.

This is a xerox copy of the boat and the area that everyone was in was - they were either in the water or with what they call a swim platform which is the little deck that is just sticking out behind the boat not in the boat.

Mrs. Hansen was never on that swim platform and it's clear from the testimony of the other, Richard Ravarino says, Question: You were standing on the swim platform? Answer: uh-huh, yes. He also grabbed DJ who was in the water.

He was standing on the back swim platform, went down and grabbed the hand of someone in the water. When she claims to have been shocked Mrs. Hansen was not on the swim platform let alone touching someone in the water and that's true with Mr. Hansen too.

He was on the rear area by the swim platform. In fact he testified, the back of the boat now with Dan, Richard and myself and DJ. The swim platform water was coming up between it. They had so many people on the back of the boat that water was actually coming up between the little slots there over the swim platform.

Mrs. Hansen was never in that area in fact and I think this is most important testimony, Linda Hansen's own testimony when DJ jumped in, so this is when the second person goes into the water, whereabouts did he jump in and she describes that and the question was, was he between the boat and Monte Travis and she says, I don't tell you that because that's - it

happened so fast because he jumped in, Carol screamed electricity and I jumped off.
Linda Hansen who is the plaintiff, that's the subject of this motion for summary judgment, jumped off the boat. She ran over and down the dock to another boat where her husband and a friend were, got them to come and help and didn't get back on the boat so she's not even in the area of the boat when all of this is happening let alone on the swim platform.

THE COURT: Well that's what caused her to jump off the boat, isn't it?

MR. WINEGAR: Well she wanted to go get help, somebody to go get help to get the people out of the water was the reason she was running from the boat. She wasn't running for fear of her own safety. She was trying to get someone, Mr. Hansen and Mr. Ravarino, two adult males who were over on another boat parked several spots down the dock.
She went over there, came and pulled one of the boys out but she was never, never anywhere near the electricity and perhaps more telling is if we want to say -

THE COURT: Did you ask her the direct question whether she had any fear for her own safety?

MR. WINEGAR: Yes. And the question was: First of all we asked her was she shocked. She says no, I was not

shocked. The next question. I take it you were never in fear of being shocked. Answer no.
It's just as simple as that. She never even had fear of being shocked and I think we can take it one step further. There was no danger in being shocked. It was 25 volts. The people who were in the back of the boat weren't in danger.

THE COURT: But they thought they were in danger.

MR. WINEGAR: That's why I say if they believe this certification may be a problem.

THE COURT: The question is not whether they were in danger, but whether they perceived they were in danger.

MR. WINEGAR: No, there must be actual danger besides perceiving it. The 25 volts may have tightened the muscles up and it may be difficult to swim. They kind of sink down a little bit but they would be able to get away from the electricity but it tightened their muscles up but Mr. Hansen is removed.
If we're talking about people on the back of the boat, frankly I would agree maybe it ought to be certified, but when Mrs. Hansen immediately jumped off the boat and ran down the dock and said she had no fear of being shocked, I think she is just far out of the question.

THE COURT: Who are the plaintiffs here?

MR. WINEGAR: Mr. Hansen is the plaintiff but not for

same part of the boat even though not on the platform when the first incident occurred?

MR. WINEGAR: She was in the back of the boat.

THE COURT: So the real factual distinction is that she was where others were who felt shocked but she didn't.

MR. WINEGAR: Well, I don't agree with that Your Honor because the ones who felt shock were on the swim platform. She was in the back of the boat and it's fiberglass. Electricity can't go through fiberglass.

THE COURT: Well I don't suppose you think about that.

MR. WINEGAR: Pardon.

THE COURT: I say I don't suppose that a person who's facing this kind of a problem in a split second starts to analyze, my gosh, nothing is wrong here, it's fiberglass. I don't think that went through anybody's mind.

MR. WINEGAR: I'm sure it didn't, Your Honor, but again that's why there is a two step test. One is actual danger in actual zone of danger and two is, you must fear for your own safety. Even if were you in danger but were unaware of it you don't get it.

THE COURT: Well, I think you're really coming back to the fear matter and -

MR. WINEGAR: I think it's undisputed you must have both. I don't think anyone argues otherwise that if you're

known that the victim's problems were being caused by electrical shock, my fear certainly would have been of electrical shock. I was in fact afraid for myself, although m fear was of a general nature and not specifically directed to the possibility of receiving an electrical shock.

Now Mr. Winegar's question in the deposition was directed only to the fear of being electrically shocked and she said no, the reason being that at the time of the event she didn't know, it was electricity that was causing the problem and she found that out sometime later in the sequence and it was probably when Carol Ravarino herself got shocked reaching in for DJ and she screamed electricity. At that, Linda jumped from the boat to the dock.

Now that's an important point here. How did she get from the boat to the dock and the picture that the court has, I believe the court still has, shows this boat with the rear deck area open.

Now in fact at the time of this event, there was a conastoga top over the rear deck of the boat that prevented anybody from simply jumping up over the boat rail down to the dock.

In order to get from the rear deck of the boat onto the dock, it was necessary for Linda to step on the swim platform through the little swim door on the stem of the boat and then up on the dock so the claim was made she was nowhere

near the swim platform or the doorway in the back through the stern of the boat where Monte Hansen got his shock. That simply is not true. It was the only way for her to get out of the boat onto the dock to this very area where he got his shock.

Now in addition to that, Mr. Hansen in the deposition testimony, it was not clear that he was in fact high and dry at the time he was shocked. The facts are that when Mr. Hansen got shocked, he was standing on the swim platform. All the others were inside the rear deck area of the boat and DJ's feet were still hanging out the back of the boat through the doorway that we're talking about. Mr. Hansen got the feet and he was helping manipulate DJ through so he could be laid on this bench area in the boat when he got his shock but at that point DJ was not in the water, no part of him was in the water and there is no evidence Mr. Hansen, any part of him was in the water.

So he got shocked when he was high and dry in the same area of the boat that his wife passed through to get the dock after Carol screamed electricity and there is no other explanation that part of the boat was electrified in that area where she passed.

So I think we have based upon that testimony and Linda Hansen's affidavit testimony, that she did fear. We have at the very least a question of fact concerning both the zone

threw in.

MR. WINEGAR: Right. I think the court's comment on does it contradict her affidavit is very pertinent. The Humphries case in Utah says a plaintiff cannot go ahead and create its own factual issue of pertinent testimony.

THE COURT: Well plaintiff can always file a affidavit to oppose a motion for summary judgment. Indeed that's what a person better do unless they want to get some rulings of law immediately, but there is law and I think it's what you're talking about to the effect that a court isn't necessarily bound to accept an affidavit that is a contradiction of previous deposition testimony. This doesn't seem to be in terms of the general fear. She wasn't - she didn't testify that she didn't have any general fear of her own safety. She said, I had no fear of being shocked.

MR. WINEGAR: Right. And I think the link there is clear. You know, I have a hard time thinking that if we allow this case to go to trial what kind of case would we throw out if someone can say, I had a general fear and I was in the general vicinity, they have a cause of action.

THE COURT: Well, I don't know if I was on a boat out in the lake some place, and it looked like a lovely day and we're all in our bathing suits and we jumped in the water and all of sudden I see a couple of my companions going down and

not coming back up and I don't know why I would be scared to death but I couldn't say well, it was a sting ray that got them and I had no fear of a sting ray.
I had no idea about it. I thought maybe it was a black hole or undercurrent. I didn't know what it was. I was scared to death though. I didn't know what it was. I suppose that would qualify as fear.
MR. WINEGAR: Yeah, but not fear of your own safety.
THE COURT: It sure as heck would be fear of my own safety. I'm coming next.
MR. WINEGAR: Well maybe with the feelings the court has, we ought to certify it.
THE COURT: I think we should. I think we should certify the issue of fear also, whether the kinds of fear that is set forth in her affidavit in view of the fact of what really was the cause of real danger was something that she had no fear for, whether it's a jury question that it was a reasonable thing to be fearful of, your own danger notwithstanding that fear was not linked to the electricity.
I think that's an issue that ought to be certified.
I think the issue of the extent of the zone of danger ought to be certified and I think that it ought to be expanded to the person who was on the back deck of that boat.
Now there is a lot of things that you need to do carefully to get that kind of expedited treatment that we were

It's simply fear and it can be global in nature which Mrs. Hansen's affidavit says she had. It was a global type of fear.

THE COURT: You submit that Mrs. Hansen is not contrary to her deposition testimony?

MR. THURBER: No I think she ---

THE COURT: Is that what you submit?

MR. THURBER: Yes. I believe that's correct Your Honor. She says in her affidavit that had she known it was electricity that was causing these horrible things that she was observing, her fear would have been of electricity.

THE COURT: Well her testimony in deposition was in response to a question that had electrity in it. Is that it?

MR. THURBER: Yeah. The question was, did you fear for being shocked yourself, electrically shocked and she said no, at that time she didn't and the reason is, she didn't know it was electricity that was causing the problem.

THE COURT: But the general question, were you in fear of danger?

MR. THURBER: That wasn't asked.

THE COURT: Was not asked?

MR. THURBER: No and that's the whole point and that's why we've got her affidavit to cover that gap in her testimony.

THE COURT: Okay. Mr. Winegar, what do you say about

IN THE UNITED STATES DISTRICT COURT
IN AND FOR TH DISTRICT OF UTAH
CENTRAL DIVISION

-000-

MONTE C. HANSEN, et al.,	)	Case No. C88-708
Plaintiffs,	)	Salt Lake City, Utah Date: December 6, 1989
vs.	)	Time: 2:00 p.m.
Sea Ray Boats, et al.,	)	
Defendants	)	

REPORTER'S TRANSCRIPT

BEFORE THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiffs:	TONY THURBER, ESQ.
For the Defendants:	DONALD L. DALTON, ESQ., GLEN T. HALE, ESQ., and TODD S. WINEGAR, ESQ.
Court Reporter:	REEVE M. BUTLER. RPR Official Court Reporter Rm. 224 Federal Bldg. 350 So. Main St. Salt Lake City, Utah 84101 Telephone 328-0837

here although the distances aren't important because this is a very different danger, it's passive danger just sitting there instead of the traditional car coning towards you, I think the same thing applies.

The problem is that she was not in any real danger of electrical shock. I don't think the plaintiff would allege she is, I don't think anyone can allege she is because she was not.

There is no factual question there and I don't think there is a factual question on her fear because reading her affidavit there was no reason for her to have any fear of electrical shock. Because of that I think it should be a dismissal.

THE COURT: Well you feel you need to establish both of those points, Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. Is it fatal that in fact there was no danger.

MR.WINEGAR: No. I think that everyone would agree you must meet both.

THE COURT: Well then you're saying it is fatal.

MR WINEGAR: Yes it is fatal, right, if you meet one or the other -

THE COURT: If you meet one that isn't enough you have to meet both?

MR. WINEGAR: Correct

IN THE SUPREME COURT OF THE STATE OF UTAH

****

MONTE C. HANSEN et al.,	)	
Plaintiffs	)	
-V-	)	Case No. 900512
SEA RAY BOATS, INC., et al.,	)	
Defendant	)	

REPORTER'S TRANSCRIPT OF PROCEEDING
SALT LAKE CITY, UTAH
MARCH 11, 1992

---

our traditional tort framework here. You've got standard of conduct, duty, whether the duty was breached. 436 appears under causation. And frankly, the two are indistinguishable.

Hypothetical, I think, illustrates the point here very well, but the same hypothetical appears in 313. Let's take the example, the mother is standing on the sidewalk, the child is crossing the street and gets wiped out by a car. Under the 33 example, she's not in any danger herself She cannot –

JUSTICE ZIMMERMAN: It's a fact question.

MR. DALTON: Fact question.

JUSTICE ZIMMERMAN: The car might jump the curb. The jury could find the car jumped the curb.

MR. DALTON: Exactly, I'll get to that in a second.

But the illustration of 436 differs in one important regard. In 436 she is in the pathway of the vehicle but she's got her back turned to it and she can't see it coming. Now, all she sees is her child being hit by this car, so all the trauma and all the shock and fright she experiences arises

I don't want to interrupt your answering my question.

MR. THURBER: The situation brings several examples to mind.

JUSTICE ZIMMERMAN: If you're done answering the question, my question is: It seem to me that 436 reads on your fact situation and the only question is whether or not she reasonably anticipated or could reasonably, you know, anticipate a harm. And that's a fact question for the trial court, that's nothing we can decide.

MR. THURBER: Well, I believe 436 --- I would agree with that statement as far as it goes, but I believe 436 goes further that that.

JUSTICE ZIMMERMAN: It seems to me much of what you parties are arguing about are really fact issues. The other side wants to tell us that the facts are X and you want to tell us they're Y, but we can't decide any of that because this is certified to us only on the question of what's Utah law on the issue.

MR. THURBER: Well, the defendants in this case are arguing that, based upon the court's - - the U.S. Court certification alone and the statement of facts that appear in them, without

regard to other deposition testimony or affidavits or proceedings in the U.S. Court, that based upon those facts alone the conclusion of section 3 13 or the restatement generally, this other part is compelled. And it's our position that there are, in reality, facts that require decision alone.

JUSTICE ZIMMERMAN: But our – we can't it seems to me, maybe I misapprehend this, but that all we can legitimately do is tell the trial court what the law is in Utah regarding zone of danger and whether 436 applies or not. We aren't in a position to say: And therefore, based on what you say the facts may be, defendants are entitled to summary judgment. That's not for us to call. That's for the trial court to call, and we aren't - - we can't be squeezed into the position of granting a hypothetical summary judgment for the defendants based on some hypothetical fact.

What the facts are is for the trial court to determine, not for us to decide. We're only to tell him what the Utah law is; isn't that right?

MR. THURBER: I'm perfectly in agreement with that. And the thinking below and the agreement between counsel and court - Judge

because they see their child being run over. That's what 313 is - -

JUSTICE ZIMMERMAN: It seems to me there's an inherent conflict though in Judge Greene's hypothetical, that if you are not in fact threatened, but you reasonably - - you know, the man on the clapamomnibus (phonetic spelling), a reasonable person who's normally, you know, considered to be an incredibly, prudent, careful, fastidious soul, perceives they're threatened in advance, but after the fact you can say they weren't threatened, isn't there inherent conflict there? I mean, weren't they actually threatened?

MR. DALTON: Your Honor, that's why I tried to keep the word reasonable out of there.

JUSTICE ZIMMERMAN: I mean, if an airplane is coming down aimed at the capitol and it veers off at the last minute, we were threatened, weren't we, even though it didn't land here, it landed over in the avenues?

MR. DALTON: Well, in that event, I think you do have a factual question and that will be resolved by the jury.

What I'm telling you, though, is that Judge Greene resolved that for you. He said, she is

not in danger, actually.
JUSTICE ZIMMERMAN: But he said she reasonably believes she was in danger.
MR. DALTON: She thought she was but she was wrong. And I'm telling you that under the - restatement, that question is answered in the negative. I mean, her perception of the threat of harm is totally irrelevant to your recovery under 313 (2). You have to be in danger. And if you are put in danger then it doesn't matter if your back is turned.
JUSTICE ZIMMERMAN: But the reasonableness of my perception depends on some objective factors, inherently to be reasonable.
MR. DALTON: Your Honor, that's precisely why I didn't like the word reasonable because that implied that there is some --- some basis for that belief
JUSTICE ZIMMERMAN: There has to be.
JUSTICE STEWART: Whether you liked it or not, it got in.
MR. DALTON: I know and - what I'm suggesting, though, is that the controlling language is what Judge Greene said, that she is not in danger. And I'm saying that the restatement

that's about. There were three people in the water and there was one individual who stood on the fiberglass swim platform on the back of the boat with basically the thing bobbing up and down in the water. He was actually standing in the water assisting one of the young men out of the water. He had contact with the water and that's why he received a shock, at least allegedly.

Mrs. Hansen never touch anybody, she was not on the swimming platform. She was inside the boat. The people who received the shock were out there touching people in the water. Your basic physics lesson.

JUSTICE ZIMMERMAN: Why was Mrs. Hansen never in danger if the boat was energized?

MR. DALTON: Well, I don't believe the boat was energized. But the bottom line of that is, if that were something that Judge Greene thought we should know, that would have appeared in the order. That never entered into his –

JUSTICE ZIMMERMAN: So she wasn't threatened, period?

MR. DALTON: He assumes she was sitting safely in the boat.

JUSTICE ZIMMERMAN: Because it's

MR. DALTON: I think you must assume that.

JUSTICE STEWART: Well, you'll just have to decide that fact when we go back.

JUSTICE DURHAM: Or at least argue with Judge Greene about it.

JUSTICE STEWART: Mr. Thurber can argue with that.

MR. DALTON: All I can say is we've argued about this kind of adnauseam down there, believe it or not. We were hoping to get a resolution of it up here.

JUSTICE STEWART: We can't decide the facts (inaudible) before us.

MR. DALTON: We not asking you to resolve it.

JUSTICE STEWART: I understand that. That's why I say maybe you'll resolve it on summary judgment or something.

MR. DALTON: That's what brought us here. We got down there and decided there's no genuine issue as to the material fact as to whether she was in danger or not. That has been decided. Judge Greene says no, she's not. She's not in any danger. That's been decided.

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FILED
UNITED STATES
DISTRICT COURT

Dec. 06 9:05 A.M. '89

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN MONTE T. HANSEN, DUANE JESS HUMPHRIES, CARO RAVARINO RICHARD RAVARINO	)
Plaintiffs,	) DEFENDANT SOUTHWEST MARINE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
vs.	)
SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation, PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation	)Civil No. 88-C-708G
Defendant.	)

Defendant Southwest Marine, by and through its counsel of record hereby submits the following reply memorandum in support of its Motion for Partial Summary Judgment on the claims of Linda K. Hansen.

ARGUMENT

I. THE EVIDENCE UNEQUIVOCALLY ESTABLISHES THAT LINDA K. HANSEN WAS NOT IN THE ZONE OF DANGER

Plaintiff Linda Hansen concedes that to recover for negligent infliction of emotional distress under Johnson v. Rogers 763 P.2d 771 (Utah 1988), she must demonstrate that she was in the "zone of danger" and feared for her own safety. Ms. Hansen's own evidence establishes that neither of those elements is present in this case. Ms. Hansen's sole argument in support of her claim that she was "within inches" of the water during the incident, a fact which is mentioned repeatedly in both Ms. Hansen's memorandum and affidavit. Plaintiff's argument, however, ignores the obvious fact that despite her proximity to the water, she was protected at all times by the boat. The zone of danger, if any, was the area of water in which electricity was present, and perhaps the water surrounding that area. Ms. Hansen was completely safe in her location in the boat away from the water. Unless she took some affirmative action, she could not possibly have been injured.

The plaintiff insists that such a construction would essentially revive the "impact" rule for recovery under negligent infliction of emotional distress While it is true that contact

Supreme Court, U.S.
FILED
AUG 25 1997
CLERK

No. 97-164

In the

Supreme Court of the United States

October Term, 1997

LINDA K. HANSEN,

Petitioner,

v.

SEA RAY BOATS, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent

No. 97-164

In the

Supreme Court of the United States

October Term, 1997

LINDA K. HANSEN,

Petitioner,

v.

SEA RAY BOATS, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following is parent of respondent Sea Ray Boats, Inc.: Ray Industries, Inc., a Delaware corporation. The following is parent of Ray Industries, Inc.: Brunswick Corp., an Illinois corporation.

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STATEMENT OF THE CASE

This petition seeks further review of a summary judgment granted in the District Court on the basis that no genuine issue existed as to material facts. The motion for summary judgment was the subject of several hearings in the District Court, including certification to the Utah Supreme Court. The matter was reviewed by the Tenth Circuit and affirmed without argument. There is no cause for this Court's review of a summary judgment granted in a "garden variety" personal injury action arising under State law.

A. The petition misrepresents how this case came before the District Court and the Utah Supreme Court.

This case involved an electrical accident at a dock on the Arizona side of Lake Powell. Four of the plaintiffs in the original action received electrical shocks when they swam behind the boat or attempted a rescue of those in the water. Petitioner Linda K. Hansen did not swim in the water and did not attempt a rescue of those in the water. As a result, she did not receive an electrical shock and was not physically injured in the accident. She claims to have suffered emotional distress as a result of witnessing the accident, which involved her son -- one of the swimmers.

In 1988, the Utah Supreme Court adopted §313 of the Restatement (Second) of Torts, governing claims for negligent infliction of emotional distress. Johnson v. Rogers, 763 P.2d 771, 785 (Utah). §313(2) of the Restatement requires that in a case such as this, where the emotional distress arises solely as a result of a threat of harm to another, the negligence of the actor must have created "an unreasonable risk of bodily harm" to the injured party. Respondent Sea Ray Boats, Inc. and the other defendants* moved for

---

* The motion was filed by defendant Southwest Marine, but joined by all

(footnote continued on next page)

summary judgment arguing that the risk of bodily harm (in this case) was in the water and for those attempting a rescue of those in the water. App. I 1.* Since by her own admission Mrs. Hansen did not attempt a rescue, she was not (according to defendants) subject to an unreasonable risk of bodily harm. App. I 2, 4.

In support of their motion, defendants cited a portion of the deposition testimony of Mrs. Hansen in which she conceded that she had not been shocked and was not in fear of receiving a shock. App. I 5. On the basis of this, defendants argued that "Mrs. Hansen was never physically threatened by the defendants' alleged conduct,...." App. I 2.

In response, Mrs. Hansen filed a memorandum in opposition and affidavit. App. J 1. In the affidavit, (¶5) Mrs. Hansen admitted that while she gave some thought to attempting a rescue, she did not:

> Although I am a non-swimmer and deathly afraid of the water, I prepared to go in the water and attempt a rescue. Just as I was going in someone or something told me subconsciously not to jump as my presence in the water would interfere with my son's rescue. I believe it was my fear for my own safety that kept me from going in.

App. J 2, ¶5.

The motion was heard December 6, 1989. At the hearing,

(footnote continued from previous page)

defendants, including Sea Ray.

* All references are to the Appendix in this brief.

BEST AVAIL

Mrs. Hansen's counsel admitted that as long as she stayed where she was, she was in no danger:

> Well by hindsight we can see as long as she didn't go in the water or reach in the water or touch somebody in the way say in an effort to bring them onto the boat, she wouldn't be hurt by electricity....

App. G 2.

Based on this, the District Court stated that it was "inclined" to grant the motion. App. G 2. The District Court did in fact grant the motion for summary judgment. App. A 1-2. However, the District Court was concerned that under different circumstances, a person in Mrs. Hansen's position might have jumped into the water. The District Court wanted to know if "a person not actually in danger may be said to be in danger because of her intimate relationship with the person who was in danger and thereby satisfy that element of the zone of danger test...." App. G 2. The District Court thought this might be a proper subject for certification to the Utah Supreme Court. App. G 2. The District Court did in fact certify the question. App. B 1.*

The first question certified was as follows: "Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress...." App. B 2. Note that implicit in the question was the determination

---

* This was after a number of hearings at which the terms of the Order of Certification were worked out.

ABLE COPY

that the person is "not actually threatened with bodily harm." This was precisely stated by the District Court at the hearing on December 6, 1989 ("a person not actually in danger"). The District Court had already made the determination, based on everything in the record at the time, that Mrs. Hansen was not in physical danger, as long as she did not attempt a rescue.

The matter was briefed and argued before the Utah Supreme Court. At the hearing, the Supreme Court was told exactly what happened in the District Court:

> MR. DALTON: What I'm telling you, though, is that Judge Greene resolved that for you. He said, [Mrs. Hansen] is not in danger, actually.
>
> JUSTICE ZIMMERMAN: But [Judge Greene] said she reasonably believes she was in danger.
>
> MR. DALTON: She thought she was, but she was wrong. And I'm telling you that under the Restatement, that question is answered in the negative. I mean, her perception of the threat of harm is totally irrelevant to your recovery under 313(2). You have to be in danger....

App. H 2.

The Utah Supreme Court made its ruling on March 11, 1992. Hansen v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah). The Supreme Court answered all of the District Court's questions in the "negative." 830 P.2d at 242. This meant that the duty to prevent

emotional distress did not extend beyond those "in danger of bodily injury." Id. at 241. The case was thus remitted to the District Court.

B. The District Court did in fact determine that Mrs. Hansen was not threatened with bodily harm.

After a hearing, the District Court granted summary judgment (again) against Mrs. Hansen. App. C 1. Mrs. Hansen moved to alter or amend the summary judgment, which was denied, App. D 1, and then (years later) moved for reconsideration, which was denied. App. E 1. In denying that last motion, the District Court stated as follows:

> Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification,...and again after the opinion of the Utah court was rendered,...this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers,....

App. E 2.

The case went to trial with the other plaintiffs, July 7-15, 1994. The jury found for Sea Ray on the question of liability, "no cause of action."

C. The Tenth Circuit's review of the dismissal of Mrs. Hansen's claim was in accordance with the record and applicable law.

The second question in the Tenth Circuit's Order and Judgment (App. F 1) concerned Mrs. Hansen's claim for emotional distress. The Court of Appeals framed the question as follows: "We view this appeal as asking us to decide whether the facts, as framed in the certification order, were hypothetical only, or whether they had already been decided by the district court prior to certification." App. F 6. The Court of Appeals decided to "focus on whether there was a genuine dispute as to Mrs. Hansen's actual exposure to bodily harm at the time the certification order was prepared, or whether the district court had resolved that issue as a matter of law prior to certification." App. F 7.

The Court of Appeals concluded as follows:

> Our review of the record, particularly the transcripts of the summary judgment hearing and the certification order hearing, convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger. Mrs. Hansen's argument that the district court's summary judgment order was based only on hypothetical facts is, therefore, without merit.

App. F 7.

The Tenth Circuit noted (in a footnote) "that the record on

appeal does not contain all of the materials that were before the district court when it ruled on the summary judgment motion." App. F 6, n.1. The Court of Appeals went on to say: "To the extent that Mrs. Hansen is asking us to review the propriety of the district court's determination regarding her presence in the zone of danger, we are unable to do so without a complete record." App. F 11.

Rule 10.1.1 of the Tenth Circuit Rules provides as follows: "It is the appellant's responsibility to order and provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised on appeal,...." Mrs. Hansen was the appellant.

After the ruling by the Tenth Circuit, Mrs. Hansen filed a petition for a rehearing. App. K 1. In the fifteen page petition, Mrs. Hansen contended that the Tenth Circuit "missed the point." The gist of her argument was not that the District Court failed to make a determination as to the zone of danger or that a de novo review could be performed (though she continues to make those points here). Rather, she contended that the fault lay with the moving parties who failed to "set[] forth each fact to which [they] contended no genuine dispute existed," App. K 2, something she believed they were required to do under Rule 56. Accordingly, Mrs. Hansen considered herself safe from the requirement that she "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). With this in mind, Mrs. Hansen stated: "There was a sufficient record created in the lower court for [the Tenth Circuit's] review of that issue in order to demonstrate that the lower court committed reversible error by granting summary judgment." App. K 3.

Sea Ray was ordered to answer the petition, which it did. App. L 1. Sea Ray was forced to explain what should have been obvious that it had no duty, in its motion for summary judgment, to demonstrate "the absence of a genuine issue of any material fact...." App. L 3. It was enough that Sea Ray pointed to something in the

record: the deposition testimony of Mrs. Hansen; her affidavit filed in opposition to the summary judgment; and the admission of her counsel, "showing...an absence of evidence to support the nonmoving party's case." (quoting Celotex Corp. v. Catrett). It was for Mrs. Hansen, at that point, to set forth specific facts showing a genuine issue as to the threat of bodily harm to her.

Mrs. Hansen was content to rest on her affidavit and the arguments of her counsel at the hearing. The Tenth Circuit denied her petition.

REASONS FOR DENYING THE WRIT

The Court's opinion in Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) answers all the questions raised by this petition: Sea Ray had no duty (when filing its motion) to prove the absence of genuine issues of material fact; Sea Ray had no duty to present "evidence" in support of its motion. 106 S.Ct. at 2553 & 2554.

Defendants pointed the District Court to deposition testimony from Mrs. Hansen that she did not enter the water; did not receive an electrical shock; and did not fear for her own safety. The record was supplemented by Mrs. Hansen's affidavit, in which she conceded that she would not have attempted a rescue, which was the only way for her to be placed in harm's way. The record was further supplemented by the admission of her counsel, at the hearing on the motion for summary judgment, that as long as she stayed where she was, she was in perfect safety. This was enough to show that those who would attempt a rescue were the ones in danger, and it was more than the mere "suggestion of counsel."

Since Mrs. Hansen carried the burden of proving this issue at trial, she took the risk that Sea Ray's showing would be sufficient. Both the District Court and the Court of Appeals agreed it was. Mrs. Hansen wishes this Court to review the sufficiency of that showing,

yet again. Seen in its true light, this petition poses nothing new. This Court should rest assured that Mrs. Hansen has received more than an ample day in court.

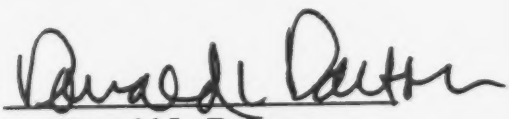
In any event, we must point out what must already be apparent: Even if the District Court had not dismissed Mrs. Hansen's claim, she would have gone to trial and lost with the other plaintiffs. Mrs. Hansen's claim rested on the same basis of liability. Even if this Court were inclined to grant certiorari, it would avail Mrs. Hansen nothing.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted this 20th day of August, 1997.

VAN COTT, BAGLEY,
CORNWALL & MCCARTHY

By 
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jan 8 1990
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	ORDER Civil No. 88-C-708G

On December 6, 1989, the Court heard arguments on the defendant's motions for summary judgment on the claims of Linda Hansen and also on defendant Southwest Marine's motion to compel. Plaintiff was represented by Anthony M. Thurber, defendant Sea Ray was represented by Donald L. Dalton, defendant Southwest Marine was represented by Todd S. Winegar, defendant Professional Mariner was represented by Glen T. Hale, and defendant Newmark did not appear.

The Court, after hearing argument and being advised in the merits, hereby rules as follows:

1. The Court hereby grants the defendants' motion for summary judgment on the claims of Linda Hansen unless Linda Hansen files, on or before December 29, a request for certification of the question to the Utah Supreme Court. If the plaintiff Linda Hansen makes such a filing including appropriate documents to make the certification to the Utah Supreme Court, this Court will schedule a hearing on whether to request such certification.

DATED this 4th day of January, 1990.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Oct 30 1990
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., an Arizona corporation, SOUTHWEST MARINE, an Arizona corporation, and PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	ORDER OF CERTIFICATION Civil No. 88-C-708G

TO: Utah Supreme Court

The United States District Court for the District of Utah, on its own motion, pursuant to Rule 41, Utah Rules of Appellate Procedure, requests the Utah Supreme Court to answer the following questions of Utah law:

1. Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress that satisfies the "threat of harm" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

2. Whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the "fear for one's own safety" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

3. If the answer to question 1 is no, would the answer be yes if the person described therein witnesses an immediate family member threatened with actual bodily harm.

This is an action by Plaintiffs Monte T. Hansen, Duane Jess Humphries and Carol Ravarino for personal injuries they claim to have sustained when they received an electrical shock in the water behind their boat at Lake Powell. Plaintiff Richard Ravarino, though never in the water himself, claims to have received an electrical shock while standing on the fiberglass

swim platform on the back of the boat and assisting Duane Jess Humphries from the water into the boat. Plaintiff Linda K. Hansen did not enter the water; come into contact with any of the four plaintiffs who claim to have received an electrical shock; or receive an electrical shock herself. She witnessed the three plaintiffs named above receiving an electrical shock, and one of those plaintiffs, Monte T. Hansen, is her son. Mrs. Hansen claims that at the time she witnessed the harm to her son, she experienced a general, "global" kind of fear, although she was not in fear herself of drowning or receiving an electrical shock. Mrs. Hansen claims damages for negligent infliction of emotional distress resulting from witnessing the harm to her son.

Defendants moved for summary judgment on the claim of Mrs. Hansen claiming that under the Utah Supreme Court's decision, Johnson v. Rogers, Mrs. Hansen fails to state a claim for negligent infliction of emotional distress because she was never in danger herself of drowning or receiving an electrical shock. Mrs. Hansen claims that the circumstances of her case bring her claim for negligent infliction of emotional distress within the parameters of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

This Court has determined that Johnson v. Rogers does not answer the legal questions raised by Mrs. Hansen's claim and that there appears to be no other controlling Utah law on the subject. The Court has also determined that the legal questions stated above are controlling questions of law as to Mrs. Hansen's claim. Those questions were first framed by the Court at the three hearings held by the Court on defendants' motion for summary judgment. The questions were then reduced to writing, in the form of a proposed Order of Certification, through a joint effort of counsel for all of the parties to this action. That proposed Order was adopted by the Court and entered on the date set forth below.

DATED this 30th day of October, 1990.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

APPROVED AS TO FORM:

/s/ Anthony M. Thurber
Anthony M. Thurber
Attorney for Plaintiffs

/s/ Arthur Lee Bishop
Arthur Lee Bishop
Attorney for Plaintiffs

DUNN & DUNN

/s/ Glen T. Hale
Glen T. Hale
Attorneys for Defendant
Professional Mariner, Inc.

C 1

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jun 1 1992
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MONTE C. HANSEN, LINDA K. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., an Arizona Corporation, SOUTHWEST MARINE, an Arizona Corporation, PROFESSIONAL MARINER, a California Corporation, and NEWMARK PRODUCTS, INC., a California Corporation, Defendants.	ORDER Civil No. 88-C-708G

On April 17, 1992 this Court heard extensive oral argument on various motions filed by plaintiffs and defendants in the above-captioned case. Plaintiffs were represented by Anthony M. Thurber. Defendant Sea Ray Boats, Inc., was represented by Donald L. Dalton. Defendant Newmark Products, Inc., was represented by Dennis R. James and Mitchel T. Rice. Defendant Professional Mariner, Inc. was represented by Glen T. Hale and Tim Dalton Dunn. The Court took all matters under advisement. Now, being fully advised the Court makes the following rulings.

1. Defendants' Motion for Summary Judgment against Linda K. Hansen is Granted

Defendants' motions for summary judgment against plaintiff Linda K. Hansen initially came on for hearing before the Court on December 6, 1989. In an Amended Order entered on January 10, 1990, the Court granted the motion. However, the Court agreed to withhold entry of summary judgment if plaintiffs sought certification of the legal issues raised by Mrs. Hansen's claim to the Utah Supreme Court.

On October 30, 1990, the Court entered an Order of Certification to the Utah Supreme Court ("Certification Order"). The Certification Order presented three questions of Utah law which, if answered in the affirmative would have had the effect of changing this Court's ruling on Mrs. Hansen's claims. As required by Rule 41 of the Utah Rules of Appellate Procedure, the Certification Order contained a statement of all facts relevant to determination of the three questions certified. The Order had previously been approved as to form by counsel for all the parties to this action.

On March 11, 1990, the Utah Supreme Court filed its answer to the three certified questions. The Supreme Court

answered each of the questions in the negative, thereby barring all claims alleged by Mrs. Hansen. Counsel for plaintiff now alleges that the facts stated in the Certification Order were incomplete and argues that there does exist a fact dispute regarding Mrs. Hansen's alleged presence in the "zone of danger." This Court finds the Mrs. Hansen's claims [sic] are governed by the facts as certified. Accordingly, defendants' motions for summary judgment against Linda K. Hansen are granted and Mrs. Hansen's claims are dismissed with prejudice.

IT IS SO ORDERED.

DATED: May 29, 1992

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Nov 30 1992
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MONTE C. HANSEN, LINDA K. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., SOUTHWEST MARINE, PROFESSIONAL MARINER, NEWMARK PRODUCTS, INC., Defendants.	ORDER DENYING LINDA HANSEN'S MOTION TO ALTER OR AMEND JUDGMENT Civil No. 88-C-708G Honorable J. Thomas Greene, Jr.

Plaintiff Linda K. Hansen's motion to alter or amend the "Order Granting Defendants' Motions for Summary Judgment

Against Plaintiff Linda K. Hansen" came on for hearing before the Court on September 1, 1992. Plaintiffs were represented by Anthony M. Thurber, and defendant Sea Ray Boats, Inc. was represented by Donald L. Dalton. The Court heard the arguments of counsel and having previously reviewed the memoranda of the parties and other materials bearing on this motion, being therefore fully advised, orders that the same is DENIED.

DATED this 25th day of November, 1992.

BY THE COURT:

/s/ J. Thomas Greene
Honorable J. Thomas Greene
U.S. District Judge

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Jul 01 1994
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MONTE C. HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, and RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC. Defendant.	ORDER Civil No. 88-C-708G

This matter came before the court on June 29, 1994 on the Hansen plaintiffs' Motion to Reconsider. The Hansen

plaintiffs were represented by David McPhie. [D]efendant Sea Ray was represented by Donald Dalton.

After hearing oral argument and reviewing the matter, this court now issues the following Order denying all three motions.

I. MOTION FOR RECONSIDERATION

Plaintiff Linda Hansen urges this court to reinstate her claim for negligent infliction of emotional distress. In support of her motion, plaintiff argues that this court has never made a determination that she was not in the "zone of danger."

Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification, by Order dated December 22, 1989, and again after the opinion of the Utah court was rendered, by Order dated June 1, 1992, this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers, 763 Pl2d 771 (Utah 1988). In the certified case of Hansen v. Sea Ray Boats, 830 P.2d 236 (Utah 1991), the Utah Supreme Court held that when a person is not in fact within the "zone of danger," emotional distress to the contrary notwithstanding, there is no cause of action for infliction of such emotional distress. Accordingly, plaintiff Linda Hansen's Motion for Reconsideration is denied.

Based upon the foregoing, it is hereby

ORDERED, that plaintiffs' Motion for Reconsideration is Denied.

DATED: July 1, 1994.

/s/ J. Thomas Green
J. THOMAS GREENE
UNITED STATES DISTRICT
JUDGE

F I L E D

FILED
United States Court of Appeals
Tenth Circuit

FEB 20 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LINDA HANSEN, MONTE T. HANSEN,

Plaintiffs-Appellants,

v.

SEA RAY BOATS, INC.,

Defendant-Appellee.

MONTE C. HANSEN, LINDA K. HANSEN,

Plaintiff-Appellee,

No. 94-4252
(D.C. No. 88-CV-708-G)
(D. Utah)

MONTE T. HANSEN,
DUANE JESS HUMPHRIES,
CAROL RAVARINO,
RICHARD RAVARINO,

Plaintiffs,

v.

SEA RAY BOATS, INC.,

Defendant-Appellant,

BRUNSWICK CORP., a Delaware corporation;
SOUTHWEST MARINE, an Arizona corporation;
PROFESSIONAL MARINER, a California corporation;
NEWMARK PRODUCTS,

Defendants.

No. 95-4190
(D.C. No. 88-CV-708-G
(D. Utah)

ORDER AND JUDGMENT

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

In 1987, plaintiffs Monte C. and Linda K. Hansen purchased a twenty-five foot cruiser manufactured by defendant Sea Ray Boats, Inc. On April 1, 1988, the Hansens' son, Monte T. Hansen, and others sustained injuries from in-water electrical shock, caused by a faulty grounding system in the boat. All three Hansens, and other plaintiffs who are not parties to this appeal, brought suit in the United States District Court for the District of Utah. Mrs. Hansen, who was on the boat and witnessed her son begin to drown because of the electrical current, brought a claim for negligent infliction of emotional distress. Her son brought a claim for negligence, and the Hansens jointly brought claims for breach of warranty.

The district court granted Sea Ray's motion for summary judgment on Mrs. Hansen's claim after the Utah Supreme Court answered questions certified to it regarding the scope of a negligent infliction of emotional distress cause of action under Utah law. Mrs. Hansen appeals this judgment.

Linda Hansen's Claim of Negligent Infliction of Emotional Distress.

In 1988, the Supreme Court of Utah held that a cause of action could be maintained in Utah for negligent infliction of emotional distress. See Johnson v. Rogers, 763 P.2d 771, 782, 785 (Utah 1988). A majority of the court agreed that the test for determining liability for the tort would be the standards as set forth in section 313 of the Restatement (Second) of Torts and as explained in the accompanying comments. See id. at 785 (Zimmerman, J., joined by three other justices, concurring in part).

The Restatement provides:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting

illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts § 313 (1965) (emphasis added). This standard is commonly referred to as the "zone of danger" test. See Johnson, 763 P.2d at 779. The issue on appeal is whether, at the time the order was certified to the Utah Supreme Court, there existed a disputed issue of material fact regarding Mrs. Hansen's exposure to "an unreasonable risk of bodily harm," see Restatement (Second) of Torts § 313 & cmt. d (1965), or, put another way, whether she was in the zone of danger. The parties agreed in the district court that the test was a dual one: a putative plaintiff must have feared for his or her own safety, and that fear must have been based on actual danger. [S]ee generally Restatement (Second) of Torts § 313 & cmt. d (1965).

During the hearing on Sea Rays' motion for summary judgment on Mrs. Hansen's claim, the court focused on two questions: (1) would the fact that Mrs. Hansen was watching her son in a hazardous situation, as opposed to observing a stranger in similar peril, alter the determination of whether she was in the zone of danger because of her possible impulse to rescue her son? and (2) while Mrs. Hansen may not have been in actual danger, what effect would there be from her genuine, albeit

incorrect, fear that she was? (transcript of certification order hearing).

After listening to the arguments about whether the facts established Mrs. Hansen's presence in the zone of danger, the court informed the parties that it would grant Sea Ray's motion for summary judgment unless Mrs. Hansen wished to file a motion for certification to the Utah Supreme Court focusing on the concerns developed at the hearing and mentioned above. The parties jointly requested certification. With the approval of both counsel for the Hansens and counsel for defendants as to form, the district court certified the following questions to the Utah Supreme Court:

1. Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress that satisfies the "threat of harm" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

2. Whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the "fear for one's own safety" requirement of Section 313 of the Restatement (Second) of Torts, as adopted by the Utah Supreme Court in Johnson v. Rogers.

3. If the answer to question 1 is no, would the answer be yes if the person described therein witnesses an immediate family member threatened with actual bodily harm.

When the Utah Supreme Court answered all three questions in

the negative, the district court entered summary judgment for Sea Ray.

On appeal, Mrs. Hansen contends the questions of law certified to the Utah Supreme Court were based on a hypothetical set of facts that "[t]here has never been a bona fide finding by the lower court that Mrs. Hansen never feared or was threatened by the electrical current once it was determined to have been the source of harm to those who received electrical shocks." Mrs. Hansen argues that issues remain regarding her fear for her own safety, and that the issue of whether she was threatened with harm "fell into a procedural void." The upshot of the certification proceeding, according to Mrs. Hansen, was to transform hypothetical facts used for the purpose of eliciting a legal opinion from the Utah Supreme Court into actual undisputed facts supporting the district court's legal conclusion that Mrs. Hansen was not in the zone of danger.

We view this appeal as asking us to decide whether the facts, as framed in the certification order, were hypothetical only, or whether they had already been decided by the district court prior to the certification. On review of the certification order, we conclude that the only statement Mrs. Hansen could logically take exception to is the first phrase of the first question: "[w]hether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim...." This wording established for the Utah Supreme Court that Mrs. Hansen, herself, was not in the zone of danger. The wording of the second question takes into account the fact that Mrs. Hansen feared for her own safety, a finding necessary to her recovery, but did not comprehend the source of the danger (because the agent of the danger was not identified to be electricity until later). This

question has no negative connotations for Mrs. Hansen. It simply reflects the apparent state of the record.[1] The third question asks whether a relationship with the actual victim is important in determining the zone of danger, thus giving the Utah court the opportunity to broaden its law beyond that established in Johnson and, arguably, giving Mrs. Hansen an additional basis for her claim. So, we focus on whether there was a genuine dispute as to Mrs. Hansen's actual exposure to bodily harm at the time the certification order was prepared, or whether the district court had resolved that issue as a matter of law prior to certification.

Our review of the record, particularly the transcripts of the summary judgment hearing and the certification order hearing, convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger. Mrs. Hansen's argument that the district court's summary judgment order was based only on hypothetical facts is, therefore, without merit.

At the outset, the parties agreed that the court would have to decide the meaning of the zone of danger under the circumstances presented. During the course of the summary judgment hearing the court made the following observations:

> "Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. Is it fatal that in fact there was no danger?"
>
> "And here it is not alleged or even claimed that there was physical danger by simply being on the boat.... I'm not sure that that's what [plaintiff's counsel] agrees to

---

[1] We note that the record on appeal does not contain all of the materials that were before the district court when it ruled on the summary judgment motion.

but I suppose that's the case."

Turning to the fact that Mrs. Hansen's son was a direct victim, the court stated:

> "Well the only real question that is, the court is in doubt on is whether the relationship has any bearing upon actual danger."

The court also observed:

> The thing that's just giving to me a little bit of interest, in the circumstances of an accident that's really traumatic, a person who is intimately connected with the person in the danger might very well do an irrational thing as jumping out of a window in an earthquake and you would be saying, everything would be just perfectly fine if you just stay right there under the table.
>
> You're not in any danger if you stay there so you're not in the zone of danger but when that happens a person objectively might do some irrational thing if they were related to the person and I don't know whether that has a bearing on determining whether a person, though otherwise out of danger is in danger because of her relationship.

In the certification order hearing, the court made the following observations:

> "Well, I think you both agree don't you that she was, in fact, was not in the zone of danger?"

In trying to concisely frame the question to be certified, it is clear that the court was no longer concerned about actual threat of bodily harm. The court stated:

"Well the whole thing we're trying to do here as I have conceived it is to test whether a person's reasonable belief and fear based upon that reasonable belief coupled with witnessing a family member, a close family member who clearly is in danger, whether that is enough, that's it, isn't it?"

And again, the court's thinking was clearly indicated:

That's the only thing we're trying to do. We're not trying to determine what is the zone of danger or whether her fear was reasonable, those are – if the Supreme Court of Utah should say, a person who is not in the zone of danger, whatever that is, has reasonable fear and it involves a family member, a close family member and if the Supreme Court of Utah should say, that isn't enough, that's that.

If they should say that is enough then we have some question of fact to try, was it reasonable for her to be in fear, was she really in fear, was – and the reasonableness of the whole thing, I think there would be questions of fact but I don't think we need to implicate the Supreme Court of Utah in any of that.

The district court clearly had decided that Mrs. Hansen was not in the zone of danger:

"I think that's what has to be stated to the Supreme Court. She is wrong, she was not in the zone of danger."

"Well I think the questions as have been suggested by [defense counsel] ought to be combined into just one question. For instance the first question doesn't have the element that I think it has to have. . . [w]hether a person who is not in the zone of danger –"

> "[H]as there ever been a case that addressed the question of whether a person believes, subjectively believes they're in the zone of danger but wrongly so?"

Finally, the court summarized the issue:

> "Well I'm interested in the fundamental question whether a person who isn't in the zone of danger who believes that they are and has a reasonable fear and there is a family member involved has a cause of action . . . . If you want to certify something like that and can frame it together fine, if you don't, let's get on with it, I'll rule on the thing."

While it would have been preferable for the district court to make an explicit finding that Mrs. Hansen was not in the zone of danger as a matter of law before the certification, we conclude it is clear from the district court's remarks that the court was of that opinion. The questions were certified for guidance in situations where someone might mistakenly believe he was in danger but was actually safe, and in situations where the actual victim was closely related to the claimant. Given the observations of the court in the record, we conclude there was no dispute of material fact regarding Mrs. Hansen's presence in the zone of danger given the state of the law in Utah at the time and absent any expansion of that law by the Utah Supreme Court. Thus, the wording of the certification order with regard to the first question was not merely a hypothetical, but was based on the decision of the district court that Mrs. Hansen was not actually threatened with physical harm. Once the Utah Supreme Court answered the questions in the certification order in the negative, Mrs. Hansen had no claim remaining, and the entry of

summary judgment by the district court was proper.[2]

As we have noted, we do not have the complete summary judgment record. The Parties in the district court refer to Mrs. Hansen's deposition but it is not in our record, and the only evidence we have going to Mrs. Hansen's claim is her affidavit. To the extent that Mrs. Hansen is asking us to review the propriety of the district court's determination regarding her presence in the zone of danger, we are unable to do so without a complete record. See Ewers v. Board of County Comm'rs, 802 F.2d 1242, 1250 (10th Cir. 1986) (unable to review claim because evidentiary matter considered and relied on by district court are not included in record on appeal). When reviewing the entry of summary judgment, we perform the same analysis as the district court, determining whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

---

[2] Our conclusion that the district court had made a factual determination regarding the question of Mrs. Hansen's presence in the zone of danger is reinforced by the court's later order denying the Hansens' motion to reconsider the summary judgment. There the court stated:

> Plaintiff Linda Hansen urges this court to reinstate her claim for negligent infliction of emotional distress. In support of her motion, plaintiff argues that this court has never made a determination that she was not in the "zone of danger."
>
> Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification, by Order dated December 22, 1989, and again after the opinion of the Utah court was rendered, by Order dated June 1, 1992, this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In the absence of a complete record, we are unable to conduct a de novo review and must, therefore, affirm the conclusion of the district court that Mrs. Hansen was not actually threatened with bodily harm, and that summary judgment for Sea Ray was proper. See Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979-80 (10th Cir. 1992).

The judgments of the district court in cases No. 94-4252 and No. 95-4190 are AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

-o0o-

MONTE C. HANSEN, et al.,	
Plaintiffs,	Case No. C88-708
vs.	Salt Lake City, Utah Date: December 6, 1989 Time: 2:00 p.m.
Sea Ray Boats, et al.,	
Defendants.	

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiff:	TONY THURBER, ESQ.
For the Defendant:	DONALD L. DALTON, ESQ. GLEN T. HALE, ESQ. And TODD S. WINEGAR, ESQ.
Court Reporter:	REEVE M. BUTLER, RPR Official Court Reporter Rm. 224 Federal Bldg. 350 S. Main Street Salt Lake City, Utah 84101

MR. THURBER: Well by hindsight we can see as long as she didn't go in the water or reach in the water or touch somebody in the water say in an effort to bring them onto the boat, she wouldn't be hurt by electricity but going in the water and rescue attempt, reaching in the water or even touching a person that was in the water we now know by hindsight would present and would have presented a danger to her. It was unrecognized at the time.

....

THE COURT: I was going to say this that I would be inclined to grant the motion for summary judgment unless Mr. Thurber wants to file a motion for certification to the Supreme Court in full compliance with the Appellate Rules of the Utah Supreme Court and do that as a motion here and then we would argue whether it is appropriate and whether you have made a sufficient showing to actually certify it.

....

THE COURT: [A]nd I suppose the unique thing that I would be interested in if it's not already ruled upon and not something that is maybe an illusory issue would be whether a person not actually in danger may be said to be in danger because of her intimate relationship with the person who was in danger and thereby satisfy that element of the zone of danger test under the conception of things of the Utah Supreme Court.

....

THE COURT: I wonder if this would be a good case to certify to the Supreme Court for determination of where the zone of danger cuts off.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * *

MONTE C. HANSEN, et al., et al.,	)	
Plaintiffs,	)	
-v-	)	Case No. 900512
SEA RAY BOATS, INC., et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDING
SALT LAKE CITY, UTAH
MARCH 11, 1992

MR. DALTON: What I'm telling you, though, is that Judge Greene resolved that for you. He said, she is not in danger, actually.

JUSTICE ZIMMERMAN: But he said she reasonably believes she was in danger.

MR. DALTON: She thought she was but she was wrong. And I'm telling you that under the Restatement, that question is answered in the negative. I mean, her perception of the threat of harm is totally irrelevant to your recovery under 313(2). You have to be in danger.

Todd S. Winegar, 3521
Karra J. Porter, 5223
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Sep 28 1989
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation, Defendants.	**MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF LINDA HANSEN** Civil No. 88-C-708G

Defendant Southwest Marine, by and through its counsel of record, hereby moves the Court to grant summary judgment in favor of said defendant, and against plaintiff Linda Hansen in the above-captioned matter. This motion is based upon the grounds that Linda Hansen has failed as a matter of law to establish the elements of a cause of action for negligent infliction of emotional distress. Specifically, Ms. Hansen was never physically threatened by the defendants' alleged conduct, and never feared for her own safety. Furthermore, Ms. Hansen is not related to plaintiffs Duane J. Humphries or Carol Ravarino, and therefore cannot recover for distress allegedly received while witnessing Humphries' and Ravarino's alleged injuries.

The grounds upon which this motion are based are further set forth in the accompanying Memorandum of Points and Authorities.

DATED this 25th day of September, 1989.

CHRISTENSEN, JENSEN &
POWELL, P.C.

/s/ Karra J. Porter
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Sep 28 1989
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, LINDA HANSEN, MONTE T. HANSEN, DUANE JESS HUMPHRIES, CAROL RAVARINO, RICHARD RAVARINO, Plaintiffs, vs. SEA RAY BOATS, INC., a Tennessee corporation; BRUNSWICK CORPORATION, a Delaware corporation; SOUTHWEST MARINE, an Arizona corporation; PROFESSIONAL MARINER, a California corporation; and NEWMARK PRODUCTS, INC., a California corporation, Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANT SOUTHWEST MARINE'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF LINDA HANSEN** Civil No. 88-C-708G

Defendant Southwest Marine, by and through its counsel of record, hereby submits the following Memorandum of Points and Authorities in support of its Motion for Summary Judgment to dispose of claims brought by plaintiff Linda Hansen.

BACKGROUND

1. This action arises out of an electrical shock allegedly received by plaintiffs Monte T. Hansen, Duane J. Humphries and Carol Ravarino while near a boat manufactured by defendant Sea Ray, sold by defendant Southwest Marine, and containing electrical parts manufactured or sold by defendants Professional Mariner and Newmark Products, Inc.

2. Plaintiff Linda Hansen's claims (which are the subject of this motion) are for negligent infliction of emotional distress allegedly resulting from witnessing her son and the two others receiving electrical shock.

3. Plaintiff Linda Hansen is the mother of plaintiff Monte T. Hansen. Ms. Hansen is not related, by blood or marriage, to either plaintiff Duane J. Humphries or plaintiff Carol Ravarino.

4. Monte T. Hansen, Humphries and Ravarino allegedly received an electrical shock when they were in the water behind the Hansen's boat. During the time of the alleged shock, Linda Hansen was safely in the boat, and it is not alleged that she was in the water with the other three plaintiffs.

FACTS NECESSARY FOR SUMMARY JUDGMENT

Ms. Hansen admits that she was not in danger of receiving an electrical shock, and that she did not fear for her own safety:

Q. I take it that you were never shocked, is that right?

A. No. I was not in the water.

Q. And I take it –

MR. DUNN: And you were not shocked?

THE WITNESS: No. I was not shocked.

Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?

A. No.

(Deposition of Linda Hansen, p. 54.)

I. A CAUSE OF ACTION FOR NEGLIGENT INFL[I]CTION OF EMOTIONAL DISTRESS DOES NOT EXIST WHEN THE PLAINTIFF IS NOT ENDANGERED BY THE DEFENDANT'S CONDUCT.

Plaintiff Linda Hansen admits that she was not electrically shocked at the time of the accident, nor at any time did she fear being shocked. (Depo. of Linda K. Hansen, p. 54.) Recovery for negligent infliction of emotional distress is not allowed where plaintiff is not endangered by the defendant's conduct. Consequently, there can be no such claim in this case.

In 1988, the Utah Supreme Court first allowed recovery for negligent infliction of emotional distress. Johnson v. Rogers. 763 P.2d 771 (Utah 1988). The majority, through Justice Zimmerman, endorsed the "zone of danger" rule set forth in the Restatement (Second) of Torts § 313. That rule allows recovery for unintentionally caused emotional distress that results in bodily harm. It stresses, however, that no recovery is permitted for illness or bodily harm caused solely by harm or peril to a third person, unless the negligence of the actor has created an

unreasonable risk of bodily harm to the plaintiff. The plaintiff must be within the "zone of danger." The comment to the Restatement section adds that recovery is permissible only when "the actor threatens the other with emotional distress likely to result in bodily harm because of the other's fright, shock, or other emotional disturbance arising out of fear for his own safety, or the invasion of his own interests." Applying this comment, Johnson v. Rogers thus stands for the idea that recovery for negligently inflicted emotional distress is permitted only when the defendant actually endangers the plaintiff.

The rationale behind the zone-of-danger rule is that there must be limitations on who may recover for a defendant's negligence. To allow any person who witnesses an accident to recovery from a negligent party for emotional distress is unworkable and impracticable. Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969).

Other states which apply the zone of danger rule adhere to the requirement that the plaintiff must be in physical danger to recover under the "zone of danger" rule. In James v. Harris, 729 P.2d 986 (Colo. App. 1986), the Colorado Court of Appeals held that the plaintiff could not recover for infliction of emotional distress caused by watching her daughter be struck by the defendant's car. As in this case, the plaintiff was not [in any] way subjected to any risk of harm, let alone an unreasonable risk of harm, and therefore was outside the zone of danger.

Similarly, a New York appeals court denied recovery for infliction of emotional distress to a father whose son was killed by the hospital's negligence. Schram v. Herkimer Memorial Hospital, 496 N.Y.S.2d 577 (App. Div. 1985). The court stated, "In order for plaintiff to prevail there must be a showing that defendants' negligence exposed plaintiff to an unreasonable risk of bodily injury or death, contemporaneously with the observation of serious injury or death of a member of his

immediate family." Id. at 577. Again, the father was not within the zone of danger, and could not recover for negligent infliction of emotional distress.

Finally, in Whetham v. Bismarck Hospital, the Supreme Court of North Dakota denied recovery for infliction of emotional distress to a mother who watched a nurse drop her child to the floor. 197 N.W.2d 678 (N.D. 1972). The court held that the plaintiff could recover only if the defendant's negligent act had threatened the plaintiff herself.

In this case, it is undisputed that plaintiff Linda Hansen was not physically endangered by any alleged negligence of the defendants. Consequently, she cannot meet the requirements of the zone-of-danger rule, and her claims should be dismissed.

For those reasons, Linda Hansen's claims fail as a matter of law, and should be dismissed.

DATED this 28th day of September, 1989.

CHRISTENSEN, JENSEN & POWELL, P.C.

/s/ Karra J. Porter
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

Oct 26 1989
Markus B. Zimmer,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN, et al.,

Plaintiffs,

-vs-

SEA RAY BOATS, INC., a Tennessee corporation, et al.,

Defendants.

AFFIDAVIT OF LINDA HANSEN

Case No. 88-C-708G

Linda Hansen being first duly sworn upon her oath deposes and states as follows:

1. I am the plaintiff in this action against whom defendants are currently seeking summary judgment.

2. When the accident which is the subject matter of this

litigation occurred I was situated on the rear deck of our Sea Ray cruiser, which was docked in the Wahweap Marina at Lake Powell.

3. From that position I observed my son Monte Travis suddenly lose his ability to swim when he was a few feet from the stern of the boat and begin to sink in the water.

4. I had no idea that electricity was the cause of my son's difficulty until later, and for that reason did not specifically fear electrical shock to myself.

5. Although I am a non-swimmer and deathly afraid of the water, I prepared to go in the water and attempt a rescue. Just as I was going in someone or something told me subconsciously not to jump as my presence in the water would interfere with my son's rescue. I believe it was my fear for my own safety that kept me from going in.

6. While I was in the boat and preparing to jump in the water, I was within inches of the water, which I now realize was charged with electricity because of electrical defects in the boat.

7. During the incident I witnessed three of our party in the water within a few feet of my position who were incapacitated and apparently dead or dying.

8. During that sequence of events I feared for my own safety, although I was not certain until later exactly what the danger was. I knew something was terribly wrong and was causing serious harm to my son and the others who were near me. Had I known that the victims' problems were being caused by electrical shock, my fear would certainly have been of electrical shock. I was in fact afraid for myself, although my fear was of a general nature and not specifically directed to the possibility of receiving an electrical shock.

9. I have since the incident learned that its cause was an electrically charged field in the water surrounding our boat which incapacitated those entering or reaching into it. I was within inches and came within an instant of entering the water in a rescue attempt while I was in a state of fear both for my own safety and that of my son Monte Travis.

10. The emotional trauma which I experienced during the incident has caused me physical injury and illness for which medical care has become necessary.

11. I now know that I was in fact within the "zone of danger" created by our boat's electrical defect since I was in the boat, which was surrounded by the electrically charged water and literally within inches of the water.

DATED this 26th day of October, 1989.

/s/ Linda Hansen
LINDA HANSEN

STATE OF UTAH)
: ss.
County of Salt Lake)

SUBSCRIBED and SWORN to before me this 26th day of October, 1989.

/s/ Judith Terry
NOTARY PUBLIC, residing at
Salt Lake County

My Commission Expires:

_____

[SEAL]
NOTARY PUBLIC
STATE OF UTAH

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-4252

LINDA K. HANSEN,

Appellant, Petitioner

v.

SEA RAY BOATS, INC.,

Appellees/Respondents.

PETITION FOR REHEARING

Petitioner Linda K. Hansen, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, hereby petitions the Court for rehearing of the above matter on grounds and for reasons as more fully set forth below.

GROUNDS FOR REHEARING

Petitioner submits that the Court has overlooked or misconstrued the fundamental and critical issue presented in Linda K. Hansen's brief on this appeal concerning the lower court's initial consideration and eventual grant of summary judgment in favor of the Defendants. Mrs. Hansen's opening argument in her brief on appeal concerned whether the Defendants had satisfied the requirements of Rule 56 of the Federal Rules of Civil Procedure by setting forth each fact to which it contended no genuine dispute existed and as properly supported by references to the record. Mrs. Hansen further asserted that, assuming Defendants' burden was established, there remained genuine issues established by her affidavit that were unrefuted by the Defendants.

There was a sufficient record created in the lower court for this Court's review of that issue in order to demonstrate that the lower court committed reversible error by granting summary judgment. Alternatively, Mrs. Hansen submitted affidavit testimony to oppose Defendants' mere inferences. The record upon which Mrs. Hansen relies on appeal is no greater than that relied upon by the lower court at the summary judgment level.

For the reasons stated below, the Court should review this matter in light of the argument as intended in Mrs. Hansen's brief on appeal, and accordingly find that the lower court erred as a matter of law under Rule 56 of the Federal Rules of Civil Procedure, and that Mrs. Hansen raised sufficient facts through her affidavit to defeat Defendants' motions for summary judgment.

POINT I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON THE CLAIMS OF LINDA K HANSEN

Petitioner notes the Court's apparent refusal to consider Mrs. Hansen's first point on appeal on the basis of a failure to include a complete copy of Mrs. Hansen's deposition, and therefore a complete review of the record was not afforded to this Court.

Mrs. Hansen did not request appellate review of the entire record to determine correctness of the lower court's ruling on the merits as a whole, but, rather, whether the evidence submitted and relied upon by the lower court was sufficient under Rule 56, F.R.C.P. Petitioner submits that the entire deposition of Mrs. Hansen was not essential on appellate review since none of the Defendants included a copy with their motions and it was never submitted to the lower court for its consideration of the motions for summary judgment.

In short, a copy of the entire deposition transcript is of no moment for purposes of the appeal, which questioned whether the limited portion relied upon and quoted by the Defendants initially would amount to sufficient evidence to satisfy the requirements of Rule 56 to establish the non-existence of material facts. Furthermore, assuming the initial burden had been met, the lower court did, in fact, consider that the affidavit of Mrs. Hansen was sufficient to raise reasonable conclusions opposing the Defendants arguments.

A. DEFENDANTS FAILED TO SATISFY THEIR BURDEN TO DEMONSTRATE THE NONEXISTENCE OF MATERIAL FACTS.

On September 28, 1989, Defendant Southwest Marine

moved for summary judgment against the claims of Linda Hansen. Southwest Marine argued two points to the lower court contending that summary judgment was proper: (1) that "**Ms. Hansen was never physically threatened by the defendants' alleged conduct [stray electricity];**" and (2) that "**she never feared for her own safety**" Id. In its supporting memorandum, Southwest Marine stated as "Facts Necessary for Summary Judgment" that "Ms. Hansen admits that she was not in danger of receiving an electrical shock, and that she did not fear for her own safety," and quoted the following from Mrs. Hansen's deposition:

Q. I take it that you were never shocked, is that right?

A. No. I was not in the water.

Q. And I take it –

MR. DUNN: And you were not shocked?

THE WITNESS: No. I was not shocked.

Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?

A. No.

The deposition was neither attached to the supporting memorandum, nor ever submitted in its entirety to the lower court. As far as Mrs. Hansen is aware, the deposition remained in the possession of defense counsel. The above-quoted section of Mrs. Hansen's deposition is the only part of the "record" relied upon by the Defendants at the time the motion for summary judgment was filed.

Defendants, however, also argued by way of counsels'

interpretation of the deposition statement that **"Plaintiff Linda Hansen admits that she was not electrically shocked at the time of the accident, nor at any time did she fear being shocked."** and further that **"[d]uring the time of the alleged shock, Linda Hansen was safely in the boat, ..."**

Defendant Professional Mariner, joining in the motion of Southwest Marine suggested:

The plaintiff was never in any danger because she did not attempt to rescue her son and she remained in the boat where there was no danger of electrical shock. In this case, the line marking the "zone of danger" was the water. The plaintiff did not cross that line.

The Defendants' arguments in support of summary judgment were fatally defective for several reasons. The only admissible "evidence" relied upon by the Defendants was the limited statement from Mrs. Hansen's deposition. Her testimony on the subject did not state that she did not ever fear from electricity or that she was not threatened by it, she merely stated that she did not receive a direct electrical shock, or did she fear being shocked simply because she did not enter the water or contact those who were in the water [sic]. Defendants merely quoted that portion of the deposition and extrapolated a meaning that remained in dispute.

The limited portion of the deposition testimony was subject to wide interpretation by the parties, and was simply construed by the Defendants as meaning that Mrs. Hansen never had any fear of any kind and had no reason to be fearful since she was safely in the boat. The notion of having no fear was premised upon the Defendants' suggestion that only the water was energized with electricity, and, therefore, Mrs. Hansen was in a safe place and thus no reasonable basis for fear existed.

Defendants offered no evidence to support the bare contentions, and were merely arguments of defense counsel. The only admissible evidence available to the lower court was the limited deposition statement and Mrs. Hansen's affidavit. The lower court's consideration of counsel's statements interpreting admissible evidence was inappropriate.

The issue of whether the boat was safe or not was greatly disputed, and was a matter squarely addressed to the lower court at the time. Despite having expert witnesses available, no affidavits were submitted by Defendants to support the respective motions for summary judgment. None of the Defendants produced any evidence or affidavits to support its [sic] original claim on summary judgment that the boat was the safest place for Mrs. Hansen, or any other person to be. The lower court accepted as true counsels' argument that the boat was a safe place, without any evidence to support it or reference to the record.

The Defendants had the initial burden of showing the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The above standard imposed upon the lower court a duty to first assure that the Defendants met their burden by demonstrating the absence of a genuine issue of **any** material fact concerning Mrs. Hansen's fear and whether she was safe on the boat. The moving party must, **at least**, identify those portions of the record demonstrating no fact remains in dispute as to that issue. Id.

Furthermore, when determining whether the Defendants met their initial burden, the lower court had a duty to examine any such evidence in a light most favorable to the non-moving party, Mrs. Hansen. Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981).

The inferences raised by the Defendants to the lower court

were three-fold: (1) the deposition statement meant that Mrs. Hansen was never in fear for her own safety from an electrical shock; (2) that Mrs. Hansen never feared for her own safety since she was safely on the fiberglass boat; and (3) when Mrs. Hansen learned of the danger confronting the others, her fear was based upon the threat to the other individuals and not to herself.

On the other hand, Mrs. Hansen's assertions to the lower court were directly contrary to those inferred by the Defendants: (1) that Mrs. Hansen was not in fear of being shocked only until she learned that electricity was present on the boat; (2) the area of the boat where Mrs. Hansen was located produced an electrical shock to one of the other individuals; and (3) after learning that electricity was present, she jumped from the boat out of fear for her own safety.

Despite the divergence of opinion and interpretation by the parties concerning whether Mrs. Hansen was in fear for her own safety and whether she was threatened from the stray electricity, those inferences were ultimately construed against Mrs. Hansen. The lower court thereafter entered its conditional order granting summary judgment, unless Mrs. Hansen sought certification on the issue of fear and the zone of danger. That "Order" unequivocally stated the lower court's opinion and ruling that the Defendants had prevailed on the matter of summary judgment. Despite the divergence of the arguments presented and the available admissible evidence, summary judgment was eminent [sic].

In that respect, the lower court erred by acting as a fact-finder determining that there were no genuine issues of fact concerning whether Mrs. Hansen feared for her own safety and that her presence on the boat caused no threat of harm [sic]. Furthermore, the lower court's opinion at that time appeared to contradict its own statements made during oral argument, including its comment in a hearing held on December 67, 1989:

THE COURT: Well you feel you need to establish

both of those points. Suppose I were to determine as I think I easily could at this point that there was a reasonable basis for fear. . . . [Emphasis added].

and, on August 29, 1990:

THE COURT: Well the rule really ought to be and in just about two minutes I think will be that if a person ought to fear that takes care of the fear question.

The lower court was obviously inclined to deny the motions for summary judgment on the issue of fear given the inferences that Mrs. Hansen feared electricity after learning of its presence. Even defense counsel acknowledged the fear that arose at the time Mrs. Hansen become aware of electricity:

MR. WINEGAR: well I think even under those circumstances what fear Mrs. Hansen had or should of had for her own safety, for her son's safety.

Yes, she should have feared and properly did so, but for her own safety. Not only did she not fear she admitted it but she shouldn't have feared because there was nothing to fear. She testified at first she wasn't even aware of the electricity and I think that's –

THE COURT: Well what was she running around the countryside to get help for if she wasn't aware of any problem?

MR. WINEGAR: She's there to get help for her son.

THE COURT: But she was aware of a problem.

MR. WINEGAR: Yes. . . .

Despite the clarifications by the lower court and

challenges to defense counsel's representations, the lower court disregarded its concerns and drew all inferences in favor of the defendants. The lower court was at that time weighing the available evidence and determining the facts, and therefore erred. Windon Third Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987) [court cannot act as the jury and determine credibility, weigh the evidence, or decide upon competing inferences]. For those reasons alone, the lower court committed reversible error.

B. MRS. HANSEN'S AFFIDAVIT REFUTED DEFENDANTS' INFERENCES.

Assuming, arguendo, that the burden on summary judgment shifted to Mrs. Hansen, she should have nevertheless prevailed by reason of her affidavit submitted to refute the contentions made by defense counsel that she did not fear for her own safety. Mrs. Hansen's affidavit provided, in part:

> 8. During the sequence of events **I feared for my own safety**, although I was not certain until later exactly what the danger was. I knew something was terribly wrong and was causing serious harm to my son and the others who were near me. Had I known that the victims' problems were being caused by electrical shock, my fear would certainly have been of electrical shock. **I was in fact afraid for myself**, although my fear was of a general nature and not specifically directed to the possibility of receiving an electrical shock. [Emphasis added].

With regard to the affidavit of Mrs. Hansen, the lower court recognized it as being sufficient to establish that Mrs. Hansen did, in fact, fear for her own safety. Not only did the lower court recognize the disputed fact concerning Mrs.

Hansen's fear, but so did the Defendants:

> **THE COURT; Doesn't she say in her affidavit she had fear of a general nature?**
>
> **MR. WINEGAR: Yes, she did. She had fear of a general nature –**
>
> **THE COURT: Not something that she now says I should have fear, but she said I did have fear of a general nature.**
>
> **MR. WINEGAR: That's right and we don't dispute that it was a fearful thing, but the law says she has to fear for her own safety reasonably.**
>
> **THE COURT: Well she says that in her affidavit. It reasonably is a conclusion.**

The lower court's comments, and those of defense counsel demonstrate that the affidavit sufficiently addressed Mrs. Hansen's fear, and moreover, that it "reasonably is a conclusion" that she had fear for her own safety. Based upon the record before the lower court as of April 5, 1990, genuine issues of material fact remained concerning whether (1) Mrs. Hansen feared for her own safety, and (2) whether she was physically threatened with harm.

There was no admissible evidence before the court to establish that Mrs. Hansen was never threatened with harm from electricity. The only inferences suggested by defense counsel were that she was safe being on the board, and she did not receive an electrical shock. The fact that she did not receive an electrical shock is not an element under the zone of danger test. A direct shock constitutes an "impact" or direct injury. It is of no consequence in this setting.

Irrespective of the deposition statement relied upon by the defendants, Mrs. Hansen's affidavit put to rest the issue of whether she had personal fear, which the lower court accepted as true and reasonable, and as conceded by the Defendants.

C. THE LOWER COURT FAILED TO ADHERE TO THE LEGAL STANDARDS FOR SUMMARY JUDGMENT.

Mrs. Hansen maintains that the lower court committed error by failing to apply the well-established standards governing motions for summary judgment. First, summary judgment is appropriate only where the record, taken as a whole, could lead no rational trier of fact to find in non-movant's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The available admissible evidence included only the limited quotation from the deposition and the affidavit of Mrs. Hansen. The lower court concluded that the affidavit sufficiently stated a reasonable conclusion that Mrs. Hansen actually feared for her own safety. Despite its statement to that effect, the lower court apparently disregarded the admissible evidence. Furthermore, the lower court addressed the Defendants' challenge that the affidavit was contradictory to the deposition testimony, and stated:

> **THE COURT: Well plaintiff can always file an affidavit to oppose a motion for summary judgment. Indeed, that's what a person better do unless they want to get some rulings of law immediately, but there is law and I think it's what you're talking about to the effect that a court isn't necessarily bound to accept an affidavit that is a contradiction of previous deposition testimony.**

This doesn't seem to be in terms of the general fear. She wasn't - she didn't testify that she didn't have any general fear of her own safety. She said, I had no fear of being shocked.

In that regard, the lower court determined that the affidavit was not inconsistent with the deposition statement that Mrs. Hansen did not fear from being shocked. The affidavit statement was clear that Mrs. Hansen stated that she had fear for her own safety once she learned of the presence of the electricity. The distinction was apparent to the lower court, but eventually ignored.

With respect to the established standard, "[w]here different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted." United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

The trial judge "must construe all pleadings, affidavits, and depositions liberally in favor of the party against whom the motion is made." City Consumer Serv. Inc. v. Horne, 578 F.Supp. 283, 288 (D. Utah 1984) (citing Adickes v. S.H. Kress Co., 398 U.S. 144, 157-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). A genuine issue for trial remains if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party, or lack of evidence presented by the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Accordingly, if doubt arises regarding any issue, the court must resolve the doubt in favor of the nonmovant and deny the motion. Id.

The well established [uniform] standard required the lower court to evaluate all inferences in a light most favorable to Mrs. Hansen. This means that the court was obligated, absent

evidence to the contrary, to consider the boat was not a safe place to be, and based upon Mrs. Hansen's affidavit that she feared for her own safety. The court was required to consider the inference that Mrs. Hansen feared for her own safety and was threatened by actual harm from the electricity. The fact that she did not receive an electrical shock is not an element required under the zone of danger rule in Utah. See Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Simply stated, the burden imposed upon the defendants was not met, and summary judgment, from its inception in this case, should not have been entered by the lower court, conditionally or otherwise. There were clearly issues of fact which remained for the fact-finder. Any question whether Mrs. Hansen feared for her own safety and whether she was threatened with actual harm were issues of fact addressed directly by affidavit.

The movant's burden under Rule 56 of the federal Rules of Civil Procedure is to lay out the basis of its motion and to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." Stover v. Eagle Products, Inc., 896 F.Supp. 1085 (D.Kan. 1995) citing Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, --- U.S. ---, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992). Moreover, the purpose of summary judgment is not to afford the court the chance to act as the jury and determine witness credibility, weight the evidence, or decide upon competing inferences. Windon Third Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

In this matter, the lower court clearly acted as the jury to determine and elect what inferences it chose to believe. The most predominant position made by the lower court was its acknowledgment that Mrs. Hansen's affidavit sufficiently set

forth a reasonable conclusion that she feared for her own safety. There was no admissible evidence concerning whether the boat was safe, and because the Defendant raised that issue, it was their burden to put forth evidence. They did not. Stover, supra.

Appellant submits that the lower court failed to apply any of the above standards. The statements proffered by Defendants' counsel were nothing more than supposition they conceived of the events on the day of the accident. Arguments of counsel do not constitute admissible evidence. The specific time when Mrs. Hansen jumped off of the boat was never argued to the lower court and the route she took was never explored. Defendants suggested that she only jumped off to get help, but even the lower court recognized an element of fear existed to prompt Mrs. Hansen's retreat from the boat.

The bottom line is that all of these inferences were always viewed as against Mrs. Hansen, which is contrary to the standards for summary judgment. Based upon all of the inferences it was the Defendants' initial burden to establish that the boat was safe. No evidence was offered.

One final matter of significance was the Defendants' claim that Mrs. Hansen was never in a position on the boat to fear receiving an electrical shock. Contrary to the suggestion of counsel, Mrs. Hansen jumped from the boat at a place where others received an electrical shock. In that regard, it was again the Defendants' burden to establish the suggestion that Mrs. Hansen jumped off the boat to get help rather than being motivated by fear. No evidence was offered other than a xerox copy of a picture of the boat and a suggestion that Mrs. Hansen's exit was other than on and over the swim platform. It was physically impossible for anyone to exit the boat other than through the cut-away in the stern, onto the swim platform, and onto the dock. It was conceded that the swim platform was in the zone of danger according to the Defendants.

The lower court committed reversible error a second time by failing to accord deference to the affidavit of Mrs. Hansen which refuted the Defendants' inferences.

CONCLUSION

Petitioner submits that this Court has failed to consider or overlooked her initial request for appellate review on the most critical point raised in her brief. Ignoring the fundamental error compounds the long-standing injustice in this matter. Each event which transpired after the initial motions for summary judgment were prompted by the lower court's continued compulsory errors. The lower court proceedings in this regard are a house of cards built upon a weak foundation arising from an erroneous initial impulse to grant summary judgment with no evidence or reasonable inference to support it. Despite the lower court's indication that the affidavit of Mrs. Hansen adequately stated a disputed fact, as conceded by Defendants, summary judgment was conditionally entered by the lower court against Mrs. Hansen. The lower court improperly acted as jury and determined the facts as it saw fit.

For the reasons stated Mrs. Hansen respectfully requests that the Court rehear this matter limiting itself to the initial moment the motions for summary judgment were brought by the Defendants. The record in that respect is complete and provided in the Appellant's Appendix, and as argued in her principal brief on appeal.

DATED this 6th day of March, 1997.

/s/ David A. McPhie
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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MONTE C. HANSEN, LINDA K. HANSEN,	)	SEA RAY'S ANSWER TO PETITION FOR REHEARING
Plaintiffs,	)	
vs.	)	Case No. 94-4252
SEA RAY BOATS, INC., SOUTHWEST MARINE, PROFESSIONAL MARINER, NEWMARK PRODUCTS, INC.,	)	
Defendants.	)	

Defendant/Respondent, Sea Ray Boats, Inc., by and through its attorneys of record, as directed by the Court, respectfully submits the following answer to the petition for rehearing of Linda K. Hansen:

A.

Mrs. Hansen's petition ignores the obvious. Her case against Sea Ray, at least on liability, stood on the same footing as that of the other plaintiffs. In other words, Sea Ray's duty to

prevent the emotional distress of Mrs. Hansen was no greater than its duty to prevent the physical injuries of the other plaintiffs. When the jury ruled against plaintiffs on their claims for physical injuries, it would have ruled against Mrs. Hansen on her claim for emotional distress, if her claim had been in the case.

This Court has affirmed the jury's verdict in finding "no liability" against Sea Ray. That ruling must, as a practical matter at least, be binding on Mrs. Hansen. If the district court committed error in dismissing Mrs. Hansen's claim for emotional distress, which Sea Ray denies, all it means is that she would have lost her case along with the other plaintiffs. If Sea Ray was not liable for the physical injuries produced by the electricity in the water, it certainly had no liability to Mrs. Hansen who merely witnessed the event.

B.

There is no recovery for emotional distress, under Restatement (Second) of Torts, § 313(1), which arises solely from a threat of harm to others. Mrs. Hansen concedes that her fear (or emotional distress) was induced by the threat of harm to others. In other words, she did not begin to fear, for herself or others, until after the effect of the electricity became apparent upon those in the water. "Fear for one's own safety" is relevant only to recovery under Subsection (1). Restatement, § 313, comment d. Since Mrs. Hansen never had recovery under Subsection (1), her fear was immaterial.

For Mrs. Hansen to recover, she would have to demonstrate, under Subsection (2), that "the negligence of [Sea Ray] has otherwise created an unreasonable risk of bodily harm to [Mrs. Hansen]." Restatement, § 313(2). The material issue is and always was whether Sea Ray placed Mrs. Hansen in danger of receiving an electrical shock.

Defendants thought her deposition testimony (that she

was in no fear of receiving an electrical shock) was sufficient to answer the question of "fear" under Section 313(1); and the question of "unreasonable risk of bodily harm" under Section 313(2). As it turned out, Mrs. Hansen supplemented that proof with her own Affidavit; her Memorandum in Opposition to defendants' Motions for Summary Judgment; and the admissions of her counsel at the original hearing of the Motions.

What Mrs. Hansen told the district court was that if she stayed where she was, she would have been in no physical danger. Mrs. Hansen admitted that while she gave some thought to a rescue, she decided against it. She purposefully did not come into contact with any of the persons in the water. Since that is where the threat of harm lay, Mrs. Hansen was perfectly safe. For this, the district court did not have to rely on Mrs. Hansen's deposition testimony alone.

It is of no moment that some of these materials were submitted by Mrs. Hansen. Rule 56(e) (FRCP) merely requires that a motion for summary judgment be "made and supported" by some such material, which of course it was. Rule 56(c) says that summary judgment shall be rendered if all the materials, not necessarily those submitted by the movant, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

There is no authority for the contention (pg. 6 of Mrs. Hansen's petition), that the district court had "a duty to first assure that the Defendants had met their burden by demonstrating the absence of a genuine issue of any material fact...." In fact, Mrs. Hansen's position is contravened by the very case she cites in support, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). In doing so, the Court explained and limited the holding of the other case cited by Mrs. Hansen, Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970): "[W]e do not think the Adickes language quoted above should be construed to

mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead,...the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554.

The Supreme Court's position on this matter was made plain on the preceding page: "The import of these subsections [56(c) & (e)] is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 106 S.Ct. at 2553 (emphasis added).

All Sea Ray and the other defendants were required to do was point to something in the record suggesting an "absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554. Once that was done, it was up to Mrs. Hansen to produce evidence showing a genuine issue of material fact on that issue. Presumably, that is what Mrs. Hansen attempted to do with her Affidavit, Memorandum and admissions of counsel. It cannot be helped that they had the opposite effect. The district court was permitted to consider those materials, in addition to those presented by defendants, in making its determination that no genuine issue existed as to Mrs. Hansen's presence in the zone of danger.

In her petition (pg. 14), Mrs. Hansen raises an old argument: That there were "others" who received an electrical shock, who were not in the water. Mrs. Hansen made no mention of this in the briefing before this Court. The reason is clear: There is no "evidence" in the record of this appeal supporting her

claim. What she refers to is the "argument" of her counsel at one of the many hearings before the district court. Mrs. Hansen should remember what she said on pg. 14 of her petition: "Arguments of counsel do not constitute evidence."

Even this non-evidence does not help. The two people she is referring to were standing on the swim platform on the rear of the boat. The swim platform is a fiberglass platform suspended from the rear of the boat, outside the main body of the boat, in direct contact with the water behind the boat. Those persons on the swim platform were assisting swimmers from the water. That is why they received a shock; they were in contact with people who were in the energized water. This is evident from another piece of argument cited by Mrs. Hansen.

None of this matters. As long as Mrs. Hansen did not attempt a rescue, she was safe from electrical shock. Even if she passed over the swim platform on her way off the boat, which is not supported by any evidence in this record, she did not stop to lend a hand with those who were in the water. This is why the district court concluded that she was in no real, physical danger. There is no evidence, in the record before this Court, to suggest otherwise.

Even if there were, Mrs. Hansen's claim would have suffered the same fate as those of the other plaintiffs. If Sea Ray were not responsible for electricity being in the water, it could not possibly be responsible for Mrs. Hansen's fear. Accordingly, and for all the foregoing reasons, the Court should deny Mrs. Hansen's petition for rehearing.

DATED this 8th day of April, 1997.

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

By /s/ Donald L. Dalton
Donald L. Dalton
Attorneys for Sea
Ray Boats, Inc.

(4)

Supreme Court, U.S.
FILED
SEP 12 1997
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No. 97-164

IN THE SUPREME COURT
OF THE UNITED STATES

LINDA K. HANSEN,

Petitioner,

-vs-

SEA RAY BOATS, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
IN AND FOR THE TENTH CIRCUIT**

REPLY PETITION FOR A WRIT OF CERTIORARI

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No. 97-164

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STATEMENT OF THE CASE

Respondent suggests that this is a *"garden variety"* personal injury action arising under State law. To the contrary, this case involved complex issues which the lower court found necessary to seek divine intervention from the State's highest Court. The issue presented concerned a legal interpretation of state law at first glance. The Respondent attempts to gain empathy by suggesting that the Petitioner has "misrepresented" how the case came before the District Court and the Utah Supreme Court on Certification. Nothing could be further from the truth.

Petitioner would first point out that the other personal injury plaintiffs were not "swimming" as suggested by Respondent, but rather were electrified simply by jumping in behind the boat. Only one of the plaintiffs [Mrs. Hansen's son] had any initial desire to swim on that early morning. The remaining three plaintiffs were rescuers. This was by no stretch of the imagination a social swimming event as pictured by the Respondent.

The issues raised on this Petition focus, not upon the type of case, but based upon an abuse of the application of a general rule of procedure concerning motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In that respect, application of a Federal Rule requires application of Federal standards under Federal case law, not State law. To that end, Petitioner asserts that there is no precedence from this, or any other court, whether arguments and suggestions of counsel rise to the level of satisfying a movant's burden when seeking a ruling on summary judgment.

Petitioner has continually over the history of this case requested the Respondent to simply point out what portions of the record it relied upon to convince the lower court that no genuine issues of material fact existed as to the Petitioner's underlying claims. To this day, Respondent fails to address this contention as demonstrated below.

A. RESPONDENT'S "EVIDENCE" IN SUPPORT OF [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT.

The basis for the Respondent's motion for summary judgment lay in its submission that *"[s]ince by her own admission Mrs. Hansen did not attempt a rescue, she was not (according to defendants) subject to an unreasonable risk of bodily harm."* [Respondent's Appendix, I, 2, 4] The argument posed by the defendants at that time was singularly premised upon Mrs. Hansen's deposition statement that:

> Q. I take it that you were never shocked, is that right?
> A. No. I was not in the water.
> Q. And I take it –
> MR. DUNN: And you were not shocked?
> THE WITNESS: No. I was not shocked.
> Q. (BY MR. WINEGAR) I take it that you never were in fear of being shocked?
> A. No.

That is the only portion of Mrs. Hansen's deposition that was relied upon by the defendants at the time they moved for summary judgment.[1] The deposition questions do not address whether Mrs. Hansen was physically threatened by an electrical shock, but only that she had no fear of being shocked since she did not enter the water or contact those who were in the water. The defendants, and

---

[1] It is claimed that the entire transcript of Mrs. Hansen's deposition was not included in the record on review, or now. The lower court never had the benefit of considering the deposition of Mrs. Hansen. The defendants only quoted from it without submitting it as part of the motion for summary judgment.

eventually the lower court and appellate court, apparently drew a different interpretation and meaning from that selected portion of the deposition statement. Therein lies the foundation for this Petition, whereby the arguments of counsel supplemented the record with argumentative inferences in order for the deposition statement to appear as if Mrs. Hansen had never been threatened by electricity; a statement that does not appear in the deposition statement.

Respondent fails to address Petitioner's opening argument that the issue of "fear" had, in fact, been resolved in favor of the Petitioner. This point is apparently conceded now by the Respondent. The only point of contention, therefore, is whether the "evidence" presented to the lower court, and that of the Court of Appeals, was sufficient for the court(s) to rule, as a matter of law, that Mrs. Hansen was never threatened by the electrical current.

The analysis of the Respondent assumes that the two prong test for the "zone of danger" rule in Utah as applied to this case comprises of a singular fact; that a person's "fear" is synonymous with a person being "threatened" by a source of harm. The two elements are not interchangeable, but distinct and separate issues to be resolved. See Johnson v. Rogers, 763 P.2d 771 (Utah 1988). Each of the selected portions of Petitioner's affidavit relate to the issue of "fear," not the issue of being "threatened." Respondent has failed to point to any part of the record wherein the "*pleadings, depositions, interrogatories, or affidavits*" treat the issue of "threatened."

B. THERE WAS NO EVIDENCE TO DETERMINE WHETHER MRS. HANSEN WAS THREATENED WITH PHYSICAL HARM.

Respondent relies solely upon the "Order of Certification" submission for its basis to argue that the "District Court did in fact

determine that Mrs. Hansen was not threatened with bodily harm." Respondent's Opposition to Petition, pg 5. ["Res.Opp"]. The focus of this Petition is not upon the statements within the "Order of Certification," but whether mere arguments of counsel are a sufficient basis to support a motion for summary judgment.

The logical error in Respondent's reliance upon the language in the Order of Certification as conclusive proof of the lower court's ruling on the threat issue is that the lower court's determination that Mrs. Hansen was not threatened with bodily harm was based upon speculation that the boat was a place of safety. To say that the lower court had already determined that Mrs. Hansen was not threatened with bodily harm based upon the "evidence" before it, is adding insult to injury. This point was also made by the Court of Appeals. The emphasis in this matter has always been placed upon the cart, rather than the proverbial horse. The lower court's penning of the Order of Certification was derived from false and inappropriate arguments of counsel, nothing more.[2]

The challenged error is that there has been no review of any evidence, but only the remarks of counsel and the court have been considered as a basis for affirming the grant of summary judgment against the Petitioner. Not once has a reviewing court placed any emphasis on or even identified any part of the record evidence upon which to base its opinions adverse to the Petitioner.

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[2] Respondent's argument concerning "a number of hearings" on the form of the Order of Certification is misleading. The lower court, according to Respondent, had already made a factual determination that Mrs. Hansen failed to satisfy the second prong of the zone of danger test; actually threatened with bodily harm. The lower court's determination of that fact is at issue here and the foundation for such is challenged, not what the Order of Certification stated. Res.Opp., pg 3.

As pointed out in her opening Petition, the defendants offered nothing by way of "pleading, deposition, interrogatories, admissions, or affidavit" that Mrs. Hansen's position on the boat was one of complete safety. In fact, Respondent fails to even elude to any such evidence, but suggests to this Court that "[t]he District Court had already made the determination, based on everything in the record at the time, that Mrs. Hansen was not in physical danger, as long as she did not attempt a rescue." [Res.Opp. at pg. 4].[3]

Petitioner was denied her constitutional right of due process as offered by the Fifth and Fourteenth Amendments to the United States Constitution, in that the District Court made judgments on material facts when such factual issues were not litigated or submitted to a jury. The issue of whether Petitioner was in the "zone of danger" was and remains in Utah to be a jury question. Petitioner was denied the right to submit the issues to a jury for determination.

The defendants made bare assertions that because the boat was made of fiberglass, and that Mrs. Hansen was positioned on the rear of the boat, that she in no manner could be threatened by an electrical shock. Again, the issue of being shocked by electricity and being threatened by it are not synonymous. The term "everything" used by the Respondent to signify an abundant record below is actually an empty void. Respondent has not referred to anything in the record, except the arguments of counsel as contained in the transcripts. Not one of the passages quoted by the Respondent resolve the question here. The Respondent's references to quoted

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[3] The record is devoid of any statement by the lower court that its ruling on the "threat" issue was based upon Mrs. Hansen's failed attempt to rescue.

portions of the transcripts is ample proof that there was nothing in front of the lower court to make such a determination on the issue of threat.[4]

The subject of this review concerns application of the standards, or lack of, and whether such standards contemplate remarks of counsel as constituting "evidence" upon which the court may properly base and decide upon issues of fact as being undisputed. The obvious defect in such an interpretation would permit the judge to weigh the arguments of counsel, make determinations from the inferences, and enter a judgment on the strength of suggestions and conjecture.

Simply stated, the unsworn statements and arguments of counsel do not constitute admissible evidence for purposes of summary judgment under Rule 56, Federal Rules of Civil Procedure. See Aramburu v. The Boeing Company, 112 F.3d 1398 (10th Cir. 1997); Panis v. Mission Hills Bank, 60 F.3d 1486 (10th Cir. 1995), cert. denied, 116 S.Ct. 1045 (1996) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

The straightforward facts in this case include (1) only defendants' oral arguments made at the summary judgment level carried the day and convinced the lower court to enter judgment; (2) the Certification Order is not dispositive of the issue here since the

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[4] Petitioner would point out that not all of the "evidence" was before the court, especially by reason of Respondent's counsel secretly having taken an electrical component off of the boat with the assistance of an expert witness, and concealing the component part in Respondent's counsel's desk drawer for some twenty-two (22) months without plaintiffs' knowledge. The lower court failed to see any adulteration or misconduct and passed on the subject over plaintiffs' objection. Summary Judgment was entered prior to the discovery of the missing evidence.

lower court had already made up its mind to grant summary judgment prior to certification; (3) statements of Plaintiff's counsel during oral argument are not admissions, especially when considered as "hindsight[5];" (4) Respondent points to no evidence, but simply indicates it exists; (5) the issue of fear was resolved in Petitioner's favor; and most important (6) a litigant has been subjected to gross abuse of the legal system, especially by reason of Respondent's counsel taking and concealing critical evidence in the case, which was not discovered until after summary judgment was entered.

If there is a shred of "evidence" as Respondent indicates to even suggest that the boat was safe and posed no threat of harm to the Petitioner, it would be a simple task to point it out. On the contrary, Respondent simply says the district court made a ruling based on "everything" before him, and, therefore, it must be correct. There is no evidence, but merely suggestions of counsel. The "evidence" Respondent refers to in its response here concerned only the issue of "fear" and not that of whether Petitioner was threatened.

Petitioner would point to one single piece of evidence that continues to escape scrutiny, as it did by the Appellate Court, that at least one other individual received an electrical shock on his arm while standing on the back of the boat, exactly where Mrs. Hansen was located. [Pet.App. C at 368: 6-22]. The defendants argument that Mrs. Hansen had no reason to be threatened by electricity is supposition, without any support other than suggestions of counsel. Defendants offered nothing in the form of affidavit or otherwise to support that bare contention.

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[5] The reference in Rule 56, F.R.C.P. concerning "admissions on file" cannot be construed to include statements of counsel made during oral argument.

The undisputed evidence at the time the motions were made was that the boat itself was the conduit through which the electricity flowed, including the engine and all components wired to it, directly or indirectly. Mrs. Hansen was within inches of the engine, and fortunately did not touch any part of it. Although she made no physical contact with energized components on the boat, just knowing they were energized created the "threat" of actual harm. Actual harm or direct contact is not required under Utah law, but merely the threat or possibility of harm. Johnson, supra.

The established standard under Rule 56, F.R.C.P. provides that *"[w]here different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted."* United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). The Diebold decision holds that where there exists affidavits, depositions, and pleadings, which create different inferences, summary judgment should not lie. In this case, the different inferences were created from arguments of counsel ONLY. Those inferences were construed against Mrs. Hansen at every stage, even upon reconsideration. In this matter, inferences concerning the issue of threat were not raised from affidavits, depositions, or pleadings, but on an oral submission of counsel. Summary judgment should not have been granted on that basis alone.

The deposition statement of Mrs. Hansen and her affidavit went only to the issue of her "fear," and NOT the issue of whether she was threatened with harm. The issue of fear was resolved against the Respondent. The issue of threat had no support other than opinions of counsel. To that end, arguments of counsel supplanted the required showing of a moving party, and such matters were inferred as against the non-moving party.

C. PLAINTIFFS PREVAILED IN THE SECOND JURY TRIAL WHERE RESPONDENT ATTEMPTED, BUT FAILED, TO DISPROVE ITS LIABILITY.

Concerning Respondent's remarks that the Petitioner has had "her day in court" and even if this matter were remanded, she would have lost like all of the other personal injury plaintiffs. Despite continued arrogance and deceitful tactics of concealing evidence in his drawer, Respondent's counsel fails to realize that he lost at the second trial. Respondent elected to bring his chosen experts to trial, and this time the jury did not believe them. Judgment was entered in favor of the Plaintiffs, especially as to the issue of liability. See Pet.Supp.App. "H" pg. 44-46 hereto.

If Mrs. Hansen is allowed her day in court, since she has yet to have one, she will prevail on the issues against the Respondent as was done before.

CONCLUSION

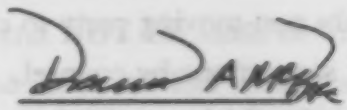
While arguments of counsel are a necessary evil in the judicial process, singular consideration of those arguments should not provide a basis for granting or denying a motion for summary judgment. In this case, a suggestion by counsel to support a motion for summary judgment should not be sufficient to switch the burden upon the non-moving party to come forward with evidence to refute verbal suggestions by counsel. To this late day, Respondent has yet to identify which part of the record it relies upon to show that the court, prior to certification, had any evidence to rule Mrs. Hansen was not threatened with bodily harm. There simply is none, and Respondent is afraid of that fact.

This Petition should be granted in order for the Court to address and rule upon the issue concerning the minimum evidentiary requirements necessary for a moving party under Rule 56, Federal Rules of Civil Procedure. More importantly, the Court should set forth its opinion whether arguments of counsel are sufficient to satisfy the movant's burden under Rule 56. If they are not, as has been faithfully contended by Respondent, then this matter must be addressed and resolved. Despite the simplistic nature of the issue presented on this Petition, no minimum standard has been addressed as it concerns application of Rule 56, F.R.C.P. standards to arguments of counsel.

There exists in this matter a serious question and potential for abuse of the minimum evidentiary requirements for a moving party under Rule 56 of the Federal Rules of Civil Procedure. Permitting supposition as a basis for granting summary judgment is violative of a litigants fundamental right of access to the courts and due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. Adulterated submissions of counsel should be expunged from any proceeding wherein a litigant's fundamental rights to due process are potentially deprived.

The petition for a writ of certiorari should accordingly be granted.

DATED this 12th day of September, 1997.



DAVID A. McPHIE
Attorney for Petitioner

SUPPLEMENTAL APPENDIX

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
June 5, 95
9:28 a.m.
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MONTE C. HANSEN and	:	
LINDA K. HANSEN,	:	
	:	
Plaintiffs,	:	SPECIAL VERDICT
	:	
v.	:	
	:	
SEA RAY BOATS, INC.,	:	
	:	
Defendant.	:	

MEMBERS OF THE JURY:

Please answer the following questions. If you find that the greater weight of the evident, by however slight a margin, is in favor of the issue presented, answer "yes." If you find the evidence is so equally balanced that you cannot determine which side is supported by the greater weight of the evidence, however, slight, or if you find that the evidence is slightly against the issue presented, you should answer "no."

1. Was the boat supplied by Sea Ray free from defects caused by faulty workmanship or materials?

Yes___ No__X__

If your answer is "yes," skip all other questions and sign and date the verdict. If your answer is "no," proceed to the next question.

2. Did Sea Ray repair defects caused by faulty workmanship or materials within a reasonable time and number of attempts?

Yes___ No__X__

If your answer is "yes," skip all other questions and sign and date the verdict. If your answer is "no," proceed to the next question.

3. Did Sea Ray warranty to repair defects caused by faulty workmanship or materials fail of its essential purpose?

Yes__X__ No___

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

4. Did the said defects caused by faulty workmanship or naterials substantially impair the value of the boat to the Hansens?

Yes__X__ No___

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

5. Did the Hansens reasonably refuse to accept the boat, or revoke their acceptance of the boat so as to be entitled to a return of the purchase price?

Yes X No____

If your answer is "no," skip all other questions and sign and date the verdict. If your answer is "yes," proceed to the next question.

6. The purchase price of the boat to the Hansens was $34,700.00. How much, if any, should be subtracted if the purchase price were to be refunded to the Hansens to make up for the Hansens' use and enjoyment of the boat?

$ 6,000.00

Proceed to the next question.

7. How much money should be awarded to the Hansens to reimburse them for their incidental and consequential damages?

$ 25,337.69

DATED: June 2, 1995.

s/ Bruce B. Adams
FOREPERSON